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The Story of *Jacobson v United States*:  
Catching Criminals or Creating Crime?

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## The Story of *Jacobson v United States*: Catching Criminals or Creating Crime?

In *Jacobson v United States*,<sup>1</sup> the Supreme Court narrowly but resoundingly reaffirmed the entrapment defense. The five justices in the majority applied the defense as a matter of law, even though a jury had considered and rejected it. They applied it to one of the most unsavory and unsympathetic crimes in the U.S. Code, receipt of child pornography. The Court accepted the argument even though a successful entrapment defense results in complete dismissal of criminal charges; thus, they allowed the defendant to go free. But the crime occurred only after the defendant, who had no record of committing crimes of this type, had been repeatedly solicited by the government over a period of 26 months, and the Court believed that had he been left alone, this crime likely would never have happened. Under the circumstances, the Court concluded, the defendant was entitled to be discharged.

The case is also notable because of the variety of potential defenses that arose from the same set of facts, including duress, entrapment by estoppel, outrageous government conduct, and the idea that undercover investigations targeting individuals should be based on reasonable suspicion. That all of these defenses would be considered or at least alluded to at various stages of the case by judges or lawyers illustrates that entrapment is one of several legal manifestations of the principle that the government

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<sup>1</sup> 503 US 540 (1992).

should not readily be able to make criminals out of persons who otherwise would have obeyed the law.

Until the process of expanding criminal liability reached a certain stage of development, government instigation of ordinary crime arose infrequently.<sup>2</sup> On the one hand, even members of the underworld could not easily be enticed into an impromptu rape, robbery, murder or other common-law felony, so such instigation on the part of law enforcement would rarely be rewarding. On the other hand, a successful proposal would be intrinsically dangerous if the crime reached the stage of a prosecutable attempt, which generally required something more than mere preparation.<sup>3</sup> For an innocent person to be raped, robbed or killed would be tragic, and embarrassingly so because it would have happened at the request of the government.

Over time, however, legislatures created new crimes as new fields were subjected to regulation. Because some of these new crimes (typified by drug and alcohol offenses) took place behind closed doors and without the participation of a direct victim who might make a report to the authorities, investigation would be necessary to ferret them out. However, some of these new crimes were not subject to the same universal moral condemnation as were traditional offenses. Accordingly, a wider group of people were potentially subject to criminal liability. Therefore, entrepreneurial law enforcement techniques became more necessary and effective, but also more likely to capture persons not otherwise criminally inclined. A person who would never help a neighbor, say, carry a kidnap victim into the basement might well help lug a case of bootleg gin.

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<sup>2</sup> Some of this history is recounted in Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 Seton Hall L J 257 (2003).

<sup>3</sup> Edwin Keady, *Criminal Attempts at Common Law*, 102 U Pa L Rev 464 (1954).

The earliest federal case recognizing the defense of entrapment is *Woo Wai v United States*,<sup>4</sup> where the defendant was charged with helping bring in Chinese immigrants from Mexico. *Woo Wai* was the harbinger of a new kind of law enforcement. The offense differed from traditional crimes in that it had been legal until fairly recently, and, because it was “victimless” it might have generated less moral condemnation from the judiciary. The court held that a defendant who agreed to participate only after a long period of persuasion was not guilty.

However, in earlier cases, the Supreme Court made clear that the authorities were not bound by any provision of the Constitution or other law to limit their activities to investigation of past crimes. The Supreme Court held that Postal Inspectors—a law enforcement agency frequently involved in litigation of claims of entrapment—could mail envelopes containing money to see if letter carriers would purloin them.<sup>5</sup> The Court also held that Postal Inspectors could submit mail orders to companies thought to be selling illegal products and use any contraband obtained in a prosecution.<sup>6</sup> So some governmental participation was constitutional. Where was the line?

The Supreme Court first recognized the defense of entrapment in *Sorrells v United States*,<sup>7</sup> a liquor case decided during Prohibition. C.V. Sorrells, a factory worker in Canton, North Carolina, had served in the 30<sup>th</sup> Division in France during World War I. A prohibition agent posing as a tourist visited Sorrells at his home, claimed to be a veteran of the same unit, and over a period of an hour or more repeatedly asked Sorrells, unsuccessfully, to get him some liquor. Finally, Sorrells acquiesced, leaving his home

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<sup>4</sup> 223 F 412 (9<sup>th</sup> Cir 1915).

<sup>5</sup> *Montgomery v United States*, 162 US 410 (1896); *Goode v United States*, 159 US 663 (1895).

<sup>6</sup> *Price v United States*, 165 US 311 (1897); *Rosen v United States*, 161 US 29 (1896); *Grimm v United States*, 156 US 604 (1895).

<sup>7</sup> 287 US 435 (1932).

and returning a few minutes later with a \$5.00 jug, where he learned that this “old war buddy” was no friend.

The Court held that the lower courts erred in concluding that the defense of entrapment was unavailable. It based its decision not on any provision of the Constitution but on statutory construction: “We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation of government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and punish them.”<sup>8</sup> The elements of the defense, the Court explained, were “that the particular act was committed at the instance of government officials” and the “predisposition and criminal design of the defendant,” which may involve “an appropriate and searching inquiry” into the defendant’s conduct.<sup>9</sup> Whether entrapment was established was to be submitted to the jury for its determination.<sup>10</sup> The court identified the “controlling question” as “whether the defendant is a person 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.”<sup>11</sup>

*Sherman v United States*,<sup>12</sup> decided in 1958, was another case in which federal law had been deployed to suppress a substance, in this case, drugs. Joseph Sherman had been approached in a clinic by a fellow addict where both were being treated for addiction. Sherman’s acquaintance, Kalchinian, turned out to be working with agents of

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<sup>8</sup> Id at 448.

<sup>9</sup> Id at 451.

<sup>10</sup> The Court also held out the possibility that certain serious crimes might be “so heinous or revolting that the applicable law would admit of no exceptions” and thus that the entrapment defense would be unavailable. Id at 451.

<sup>11</sup> Id at 451.

<sup>12</sup> 356 US 369 (1958).

the Bureau of Narcotics. Kalchinian repeatedly asked Sherman, over a period of time, for help obtaining drugs. Kalchinian claimed that treatment was not working and that he was suffering symptoms of withdrawal. Finally, Sherman agreed to provide drugs, and purchased drugs that he and Kalchinian shared on several occasions, and Sherman was arrested.

The Court held that Sherman had been entrapped as a matter of law, discharging him in spite of the jury's consideration and rejection of the defense.

The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However "A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."<sup>13</sup>

"[T]o determine whether entrapment has been established," said the Court, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

In *Sherman*, there was no question of government inducement; Kalchinian came up with the idea of purchasing drugs and persuaded Sherman to carry it out. The issue was Sherman's predisposition. The Court noted that Sherman made no profit on the sales, and that no narcotics were found in his apartment when it was searched. More problematic was the fact that Sherman had two drug convictions, one nine years old, the other five. However, said the Court, these are "insufficient to prove that [Sherman] had a readiness to sell narcotics at the time Kalchinian approached him."<sup>14</sup>

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<sup>13</sup> Id at 820-21 (quoting *Sorrells*, 287 US at 442).

<sup>14</sup> Id at 375.

*Sorrells* and *Sherman* applied what has come to be known as the “subjective” test, requiring inducement of the transaction by the government and the lack of “predisposition” by the defendant. Powerful concurrences in both cases urged the Court to apply a different approach, which would focus on “the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime.”<sup>15</sup> Advocates of the “objective” approach considered the idea that the defense was premised on an unexpressed legislative intent to be “sheer fiction”; it was better grounded on the court’s supervisory authority over federal law enforcement.<sup>16</sup> Accordingly, many advocates of the objective test would give enforcement, as with the exclusionary rule, to judges rather than juries.<sup>17</sup> Although the Supreme Court has rather definitively adhered to the subjective test, courts in the states are divided, some following the objective approach, some subjective, and some a hybrid where both the court and the jury consider the defense in turn.<sup>18</sup>

The great mystery of entrapment law is the meaning of predisposition.<sup>19</sup> Because the defense was created as a matter of statutory interpretation, Congress is free to clarify it, and the states are free to shape it as they wish, but Congress has not acted, and the states, for the most part, have adopted some variant of the ideas contained in the earliest Supreme Court decisions. Accordingly, courts and lawyers still struggle with the meaning of a term of art created in 1932 that turns out to be rather difficult to construe.

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<sup>15</sup> Id at 384 (Frankfurter J., concurring).

<sup>16</sup> Id at 379-80.

<sup>17</sup> *Sorrells*, 287 US at 457 (Roberts concurring).

<sup>18</sup> See Paul Marcus, *The Entrapment Defense* (Lexis Nexis 3d ed. 2002).

<sup>19</sup> See Louis Michael Seidman, *The Supreme Court, Entrapment, and our Criminal Justice Dilemma*, 1981 Sup Ct Rev 111.

Predisposition cannot mean disposition in the sense that an individual's character is such that they are capable of committing a particular crime. By definition, the entrapment defense is irrelevant except in cases where the factfinder concludes that the defendant voluntarily engaged in the prescribed conduct with the necessary mens rea, that is, that by the time of the crime, the defendant was willing to do it. Presumably many people would not sell illegal substances regardless of any persuasion, enticement or encouragement short of physical compulsion. Sherman and Sorrells, by contrast, were at some level ready to commit the crime, yet, the defense was available to them.<sup>20</sup>

Predisposition also cannot exist simply because a defendant has actually engaged in the conduct in the past. Sherman was "predisposed" to drug use; he'd been convicted of it before and was in treatment because he was a recent user and therefore offender; if he had lost interest in taking drugs, there would have been no reason for him to be in treatment. Yet, Sherman was not predisposed as the Supreme Court used the term. Sorrells, too, had a remarkable knowledge of the illicit market in white lightning for a teetotaler. These defendants were clearly not "innocent" in any absolute sense, yet the Court referred to both as innocent for purposes of applying the entrapment defense.<sup>21</sup>

### *The Investigation of Keith Jacobson*

The facts in *United States v Jacobson* are like a drawing that dramatically changes form depending on how you look at it. On the one hand, the evidence suggests that

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<sup>20</sup> In addition, "if the entrapment defense were truly concerned with the culpability of the individual defendant and protecting those who were not predisposed to commit the crime, then the defense should be available to those who were lured into committing crime by private parties, and not just by government agents." Michael L. Piccarreta & Jefferson Keenan, *The Entrapment Defense*, 8 Crim Just 13, 58 (Summer 1993).

<sup>21</sup> *Sherman*, 356 US at 376; *Sorrells*, 287 US at 449.

Keith Jacobson was a law abiding person who, had the government simply left him alone, might well have lived his entire life without ever committing a crime. On the other hand, with no direct coercion, Jacobson purchased child pornography, something that most people would never have done based on the solicitations and entreaties Jacobson received. It is little wonder that this case split a panel of the U.S. Court of Appeals for the Eighth Circuit, the circuit sitting *en banc*, and then the Supreme Court itself.

The underlying events are fairly clear, if complex.<sup>22</sup> In 1984, lifelong bachelor Keith Jacobson lived in Newman Grove, Nebraska, the town of about 800 where he was born and where he returned after retiring from a career in the U.S. Army. His duties in the service included working for the newspaper *Stars and Stripes*. He held a B.A. in Public Administration from Upper Iowa University. In Newman Grove, Jacobson worked for a local shopping newspaper for a while, then drove a school bus, grew soybeans and corn on his 80-acre family farm, and served as the treasurer of the Zion Lutheran Church.

Also in 1984, Jacobson also ordered the magazines *Bare Boys I* and *Bare Boys II* and a list of adult book stores by mail order from a San Diego business called Electric Moon. At the time, purchase and possession of these magazines violated no law even though they featured naked photographs of boys; they did not depict explicit sexual conduct of any kind. Accordingly, they were not legally obscene.<sup>23</sup>

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<sup>22</sup> These facts are drawn from the parties' briefs, from newspaper accounts, and from a September 21, 2004 interview with George Moyer. See Dirk Johnson, *A Farmer Framed in a Porn Sting*, San Francisco Chron, May 3, 1992 at 3; David Thompson, *Nebraska Man is "Overjoyed" With Decision*, Omaha World Herald, Apr. 6, 1991 at 1; Paul Tash, *Entrapment or Service to the Public*, St. Petersburg Times, Dec. 2, 1991, at 1A; David Thompson, *Madison Attorney Back to Earth*, Omaha World Herald, Nov 18, 1991, at 9; Paul Goodsell, *Porn Sting of Nebraskan is Defended*, Omaha World Herald, Nov 7, 1991, at 1; Ruth Marcus, *Fair Sting or Foul Trap?*, Wash Post Nov 6, 1991, at A1.

<sup>23</sup> See *United States v X-Citement Video*, 513 US 64, 74 n.4 (1994) ("The *Miller* test for obscenity asks whether the work, taken as a whole, 'appeals to the prurient interest,' 'depicts or describes [sexual conduct]

It was legally significant that Jacobson ordered the magazines in February, because 1984 was a year of change in this area of the law. In 1982, the Supreme Court held in *New York v Ferber*<sup>24</sup> that the government could criminalize the distribution of non-obscene but sexually explicit materials involving minors. Although Congress had regulated transportation of some child pornography before *Ferber*,<sup>25</sup> it was not until May, 1984 that Congress prohibited the receipt of non-obscene sexually explicit materials involving minors when it passed the Child Protection Act of 1984.<sup>26</sup> Thus, what Jacobson did legally in the Winter was a crime by Spring. Later in 1984, California police found Jacobson's name and address when searching Electric Moon. This information brought Jacobson to the attention of the federal authorities.

Jacobson described himself as bisexual, but said he was never a practicing homosexual. In January, 1985, Jacobson received a letter from the American Hedonist Society, and a membership application containing a survey of sexual attitudes. The documents proposed that Americans had the "right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality." Jacobson responded, noting that he was interested in pre-teen sex, but that he was opposed to pedophilia. The "American Hedonist Society" was in actuality a U.S. Postal Inspector trolling for persons interested in child pornography.

In May 1986, over a year later, Jacobson received a sexually oriented solicitation from "Midlands Data Research;" he replied that he was "interested in teenage sexuality."

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in a patently offensive way,' and 'lacks serious literary, artistic, political or scientific value.'" (quoting *Miller v California*, 413 US 15, 24 (1973)).

<sup>24</sup> 458 US 747 (1982).

<sup>25</sup> Protection of Children Against Sexual Exploitation Act, Pub. L. 95-225, 92 Stat. 7 (1978).

<sup>26</sup> Pub.L. 98-292, 98 Stat. 204 (1984).

A couple of months later, Jacobson got a letter and survey from “Jean Daniels,” director of the “Heartland Institute for a New Tomorrow,” a purported a lobbying organization “founded to protect sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting your sexual freedom should be rescinded through the legislative process.” The Heartland Institute was another front organization. Jacobson completed and returned the survey, again expressing interest in “pre-teen sex-homosexual.” He also stated “Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms.”

Jacobson received a thank-you note from Jean Daniels of HINT, along with a list of names and addresses of persons with similar interests, but Jacobson did not initiate correspondence with any of them. Using the pseudonym “Carl Long” (one of the names listed in the Jean Daniels letter) a postal inspector wrote to Jacobson. Jacobson wrote twice, in letters that did not discuss child pornography, and then stopped replying to Long’s letters.

In March 1987, the Customs Service sent Jacobson a brochure for child pornography materials. He placed an order, but the material was never sent. Also in March, 1987, a postal inspector sent a brochure from the “Far Eastern Trading Company” offering to send a catalog. Jacobson requested one, and it arrived in May, 1987. From that catalog, Jacobson ordered *Boys Who Love Boys*, which, according to the catalog, involved “11 and 14 year old boys” who “get it on in every way imaginable. Oral, anal sex and heavy masturbation. If you love boys you will be delighted with this.”

On June 16, 1987, Jacobson found a notice in his post office box, and exchanged it for an envelope containing *Boys Who Love Boys*. Postal Inspector Calvin Comfort, who had conducted most of the investigation, observed Jacobson pick up the magazine and obtained a warrant to search Jacobson's home. Comfort, accompanied by Customs Agents and the local sheriff, confronted Jacobson at his home, and searched the residence. In addition to *Boys Who Love Boys*, Comfort found the *Bare Boys* magazines, and the fabricated correspondence from the government, but no other child pornography related materials.

Jacobson was indicted in September, 1987, and in April, 1988, was tried by jury before Chief Judge Lyle E. Strom of the U.S. District Court for the District of Nebraska. He was charged with violation of 18 U.S.C. § 2252(a)(2), knowingly receiving through the mails sexually explicit material depicting a minor.

Jacobson retained attorney George H. Moyer, Jr., a graduate of the University of Nebraska law school, whose general practice included cases ranging from agricultural law to workers compensation. Moyer got the case when Jacobson walked into his office, and represented Jacobson throughout the case. Moyer, the third of four generations of Moyers who practiced in the same firm, called himself "a little old county seat lawyer," but was described by a fellow attorney as "probably one of the shrewdest trial lawyers in the state." At trial, Moyer raised the defense of entrapment, but the jury rejected it.

Jacobson was sentenced to three years' imprisonment, suspended in favor of two years' probation and 250 hours of community service.<sup>27</sup> Jacobson discharged his community service by painting a church garage and working at the town library. He was fired from his school bus driving job, although there was no evidence that he engaged in

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<sup>27</sup> *United States v Jacobson*, 893 F2d 999, 1000 (8<sup>th</sup> Cir 1990).

misconduct with children; “I’m not the kind of person who wanted to get involved with kids that way. I never have and I never would,” he said. He was forced to sell his share of the farm to his sister to pay his \$25,000 in legal fees.

Jacobson explained his purchase of child pornography by saying “They kind of worked on me. . . . I bought it. It’s something I regret doing, [but] I just figure I was kind of gullible at the time.” The case “just destroyed my life. It destroyed the way I viewed myself.”

The surveys, letters and advertisements Jacobson received had been part of a postal investigation called “Project Looking Glass.” In 1991, the Postal Service claimed that 147 convictions resulted from the investigation, including 35 cases where there was evidence that the defendants were molesters or producers of child pornography. Four of the targets committed suicide.<sup>28</sup> Tragically, the lead investigator, Postal Inspector Calvin Comfort, himself committed suicide in 1999, explaining in a note that he was despondent over stress from his job.<sup>29</sup>

In spite of Jacobson’s conviction, the Newman Grove community stood by him. The local newspaper wrote that “[m]ost any of us could be set up for such a sting;” his pastor stated that “he’s always been an honorable person and we supported him.”

### *The Lower Court Decisions*

Jacobson appealed the conviction to the U.S. Court of Appeals for the Eighth Circuit. A panel of the Eighth Circuit decided the appeal on January 12, 1990. Senior Judge Gerald W. Heaney wrote an opinion joined by Chief Judge Donald P. Lay. They

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<sup>28</sup> For a critical discussion of Project Looking Glass, see Douglas O. Linder, *Journeying Through the Valley of Evil*, 71 N C L Rev 1111 (1993).

<sup>29</sup> Associated Press, *Milwaukee Postal Inspector Found Dead In His Parked Van*, Wisconsin St J, Apr 2 1999 3C (1999 WL 5296339).

began with facts that must have made the defendant and his counsel optimistic, noting that he is “currently living on a family farm and supporting his parents. Jacobson served in the Korean and Vietnam Wars, for which he received the Bronze Star and Army Commendation Medal. He has no criminal history, with the exception of a conviction for driving while intoxicated in 1958.”<sup>30</sup> They ordered the conviction reversed.

At this stage, *Jacobson* was not decided as an entrapment case; the gist of the opinion was that the government should not have initiated the investigation of Keith Jacobson because they “had no evidence giving rise to a reasonable suspicion that Jacobson had committed a similar crime in the past or was likely to commit such a crime in the future.”<sup>31</sup> The majority reasoned first that the legal 1984 purchase of nudist magazines “(1) . . . was not evidence of predisposition and did not give rise to a reasonable suspicion based on articulable facts that Jacobson had committed a crime in the past or was likely to commit a crime in the future; (2) the government must have reasonable suspicion based on articulable facts before initiating an undercover operation directed at a person, and (3) since the undercover operation was improper, Jacobson’s conviction must be set aside.”<sup>32</sup>

The purchase of the *Bare Boys* magazines was insufficient to amount to reasonable suspicion. Its probative value was diminished because the purchase was entirely legal: “[w]hen an individual engages in legal conduct and no additional or extrinsic evidence exists to give rise to a reasonable suspicion of predisposition, the government may not target that individual, no matter how distasteful the lawful conduct may be.”

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<sup>30</sup> 893 F2d at 999-1000.

<sup>31</sup> Id at 999.

<sup>32</sup> Id at 1000.

The court recognized that “the use of undercover operations is indispensable to the achievement of effective law enforcement.” However, “the potential harms of undercover operations call for the recognition that there must be some limitation on the indiscriminate use of such government targeting.”<sup>33</sup>

Judge George G. Fagg dissented, asserting that the majority “has declared war on the government’s power to initiate undercover investigations.” He answered in the majority’s terms, rejecting the idea that reasonable suspicion was an indispensable prerequisite for initiating an undercover investigation, instead arguing that an investigation was valid unless the defendant could show that it violated due process. “In my opinion, the panel has borrowed from the rule of probable cause to arrest, and from the rule of particularized suspicion that governs brief investigatory detentions, for the singular purpose of narrowing the government’s power to initiate undercover investigations. Needless to say, law enforcement decisions to conduct undercover investigations are not controlled by fourth amendment doctrine.” Application of the proper due process standard, said Judge Fagg, would lead to affirmance, because “the government possessed well-grounded reasons to believe that an investigation aimed at Jacobson would uncover criminal behavior.”<sup>34</sup>

Disappointed with the result, the Department of Justice successfully sought rehearing en banc. En banc, Judge Fagg reversed roles, authoring the decision for an eight judge majority which addressed three issues precisely and succinctly.<sup>35</sup> First, the court said that no reasonable suspicion was necessary before the government could undertake an undercover investigation against an individual; the only general limitation

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<sup>33</sup> Id at 1002.

<sup>34</sup> Id at 1003.

<sup>35</sup> *United States v Jacobson*, 916 F2d 467 (8<sup>th</sup> Cir. 1990) (en banc).

was due process. Due process would invalidate an investigation, or a decision to investigate, “only when the [g]overnment activity in question violates some protected right of the defendant.”<sup>36</sup> Since Jacobson made no such claim, the presence or absence of a factual basis for investigation was irrelevant.

The court then addressed Jacobson’s claim that the government’s conduct during the investigation was sufficiently outrageous that his due process rights were violated. The court recognized that in earlier decisions, a majority of the justices had stated that outrageous governmental conduct could invalidate a conviction.<sup>37</sup> However, “because the government can go a long way in concert with the investigated person without violating due process, the level of outrageousness needed to prove a due process violation ‘is quite high.’”<sup>38</sup> The court noted that “the postal inspectors did not apply extraordinary pressure on Jacobson. The inspectors merely invited Jacobson to purchase pornographic material through the mail. . . . Unlike face-to-face contacts, Jacobson easily could have ignored the contents of the mailings if he was not interested in them.”<sup>39</sup>

Finally, the court addressed Jacobson’s claim that he had been entrapped as a matter of law. The jury necessarily rejected the entrapment claim by convicting; the court said it was entitled to do. “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.”<sup>40</sup>

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<sup>36</sup> Id at 469 (quoting *Hampton v United States*, 425 US 484, 490 (1976)).

<sup>37</sup> Id at 469 (citing *Hampton*, 425 US at 492-95 & *United States v Russell*, 411 US 423, 431-32 (1973)).

<sup>38</sup> Id (quoting *Gunderson v Schlueter*, 904 F2d 407, 410 (8<sup>th</sup> Cir 1990) and citing *United States v Musslyn*, 865 F2d 945, 947 (8<sup>th</sup> Cir 1989) (per curiam)).

<sup>39</sup> Id at 470.

<sup>40</sup> Id at 470.

Judges Lay and Heaney, who had comprised the majority in the panel, could get none of their colleagues to join them. Indeed, at this point, they did not even fully agree with each other, dissenting in separate opinions on separate grounds.

Chief Judge Lay's dissent argued that Jacobson had established entrapment as a matter of law, because he was not predisposed. "From the uncontroverted facts in this case, it is readily apparent that Jacobson was not predisposed to commit the crime of receiving through the mails sexually explicit materials depicting a minor." Although in response to the inquires arranged by the government Jacobson expressed an interest in pre-teen sex magazines, "[b]ased on Jacobson's prior history, it is not clear that he would knowingly and voluntarily violate the law by purchasing obscene materials. . . . The government invested considerable time and money to prosecute a man who would never have committed a crime but for the government's encouragement. The government should not concentrate its efforts on incriminating innocent individuals, rather it should strive to suppress criminal behavior."<sup>41</sup>

Judge Heaney agreed that "[h]ad the Postal Service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business."<sup>42</sup> He adhered to the view that the legal doctrine that gave rise to a defense was that "the government must have . . . a reasonable suspicion before instituting an undercover sting directed at an individual." However, the only case he cited was a Ninth Circuit decision which was then being

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<sup>41</sup> Id at 471.

<sup>42</sup> Id at 471.

reheard en banc; en banc, the Ninth Circuit vacated the relevant portion of the decision, leaving that legal argument without supporting precedent.<sup>43</sup>

Judge Heaney also elaborated on the argument that the government conduct was outrageous. The prosecution “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.”<sup>44</sup> “In my view, the government’s investigation and prosecution of Jacobson amount to the deliberate manufacture of a crime that would never have occurred but for the Postal Service’s overzealous efforts to create it.”<sup>45</sup>

### *The Supreme Court Decision*

Although Jacobson’s attorney George Moyer had never been to the Supreme Court, and was not even admitted when the Eighth Circuit affirmed the conviction, he had participated in dozens of appeals to the Nebraska Supreme Court and in other cases in the Eighth Circuit. Moyer sought *certiorari* in a petition containing seven grounds, advancing various forms of the outrageous government conduct defense, the absence of reasonable suspicion, and entrapment. Justice Stevens picked the case out of the pile of thousands of mostly hopeless *certiorari* petitions. Jacobson initially did not receive the necessary four votes, but Justice White asked for a re-vote, and Stevens, Marshall and Blackmun agreed that the case should be accepted.<sup>46</sup> According to his biographer,

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<sup>43</sup> Id at 472 (citing *United States v Luttrell*, 889 F2d 806, 813 (9<sup>th</sup> Cir 1989), vacated in relevant part en banc, 923 F2d 764 (9<sup>th</sup> Cir 1991)).

<sup>44</sup> Id at 474.

<sup>45</sup> Id at 476.

<sup>46</sup> Joyce Murdoch & Deb Price, *Courting Justice: Gay Men and Lesbians v. the Supreme Court* 410 (Basic Books 2001)

Justice White was “[t]roubled by the government’s behavior . . . his preliminary view of the record was that Jacobson had been harassed by government agents run amok.”<sup>47</sup>

The grant of certiorari was limited to the question of whether Jacobson had established entrapment as a matter of law.<sup>48</sup> The parties’ briefs focused the issues. Moyer insisted that the predisposition required by *Sorrells* and *Sherman* was not a “sexual, pharmaceutical or political” interest, but rather “intent to commit the crime.”<sup>49</sup> In addition, “predisposition ‘must appear before anything at all occurs respecting the alleged offense.’”<sup>50</sup>

The brief also attempted to distinguish the government’s efforts in this case from other types of stings on the ground that these crimes might never have occurred but for government facilitation. Jacobson was caught in a “national program in which the postal authorities would actually solicit, advertise, sell, manufacture and deliver child pornography.”<sup>51</sup> “The Government has become the number one commercial purveyor of child pornography in the United States. Government created publications are the only publications in the United States today which advertise, sell, offer to purchase or exchange child pornography.”<sup>52</sup> “Lonely old men who may harbor ‘private fantasies’ are not within the statute’s ambit. Although the government has a duty to protect children by

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<sup>47</sup> Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* 420 (The Free Press 1998).

<sup>48</sup> *Jacobson v United States*, 499 US 974 (1991).

<sup>49</sup> App Brief at 16.

<sup>50</sup> Id at 16-17 (quoting *United States v Williams*, 705 F2d 603, 618 n.9 (2d Cir 1983)).

<sup>51</sup> Id at 28.

<sup>52</sup> App. Reply Brief at 11 & n.5. Here, Jacobson cited Lawrence Stanley, *The Child Pornography Myth*, 7 *Cardozo Arts & Ent L J* 295, 324 (1989). The Stanley article is a well-researched and scholarly argument for the idea that the problem of child pornography had been greatly exaggerated, and that the commercial market had long since dried up. Unfortunately, the credibility of that article has been profoundly impeached by an undisclosed conflict of interest: Mr. Stanley was himself deeply involved with sexual images of children, and actual children, giving rise to numerous scrapes with the law, including some convictions. See *Stanley v United States*, 932 F Supp 418 (SDNY 1996); Robert Stacy McCain, *Porn Lawyer Arrested in Brazil, Charged with Child Exploitation*, *Wash Times*, July 24, 2002.

suppressing the market for child pornography, the Government cannot first create the market by tempting the innocent, but vulnerable and then justify prosecution by claiming it is merely suppressing the market.”<sup>53</sup>

Solicitor General Kenneth W. Starr’s brief responded that evidence of predisposition need not involve criminal offenses. Although Jacobson’s receipt of the *Bare Boys* magazines “did not violate federal law . . . that fact does not deprive his mail order purchase of those magazines of evidentiary significance on the issue of his predisposition to receive *Boys Who Love Boys*.”<sup>54</sup>

One aspect of the Solicitor General’s brief and subsequent oral argument defended the conviction on grounds that sound more in duress<sup>55</sup> than entrapment. The Solicitor General addressed the argument that the government induced the crime. The brief notes that postal inspectors did not apply extraordinary pressure or coercion,<sup>56</sup> and argued that entrapment was made out only if “the government’s behavior was such that a law-abiding citizen’s will to obey the law could have been overcome,”<sup>57</sup> or an “average person could not resist.”<sup>58</sup> Such behavior would include grave threats, fraud, or extraordinary promises.<sup>59</sup> “Petitioner concedes that he was neither ‘coerced’ nor ‘force[d]’ into committing the crime.”<sup>60</sup>

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<sup>53</sup> App Repl Br at 20.

<sup>54</sup> Resp Br at 29.

<sup>55</sup> See Model Penal Code § 2.09(1) (“It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”).

<sup>56</sup> Resp Br at 12, 14,

<sup>57</sup> Id at 18 (quoting *United States v Kelley*, 748 F2d 691, 698 (D.C. Cir. 1984)).

<sup>58</sup> Id at 17.

<sup>59</sup> Id at 20 (citing *United States v Evans*, 924 F2d 714, 717 (7<sup>th</sup> Cir 1991)).

<sup>60</sup> Id at 25.

Several prominent groups filed amicus briefs. Newt Gingrich, Henry Hyde, Richard Arme, Rick Santorum and other members of Congress filed a brief emphasizing the importance of undercover investigations in catching pedophiles, as did the National Center for Missing and Exploited Children. Legendary Northwestern Law Professor Fred Inbau was one of the signers of the brief of Americans for Effective Law Enforcement, which argued that there had been no entrapment and that reasonable suspicion was not required before initiating an undercover investigation.

The ACLU, Nebraska Civil Liberties Union and the National Association of Criminal Defense Lawyers filed a brief supporting Jacobson; three out of four authors are law professors as of 2005. Pace Law Professor Bennett L. Gershman was counsel of record; with him on the brief were ACLU lawyers John A. Powell, who became a professor of law at Ohio State, and William B. Rubenstein, who joined the faculty at UCLA.

Moyer prepared for the argument by returning to law school. University of Nebraska College of Law Professor Richard Harnsberger, who had taught Moyer when Moyer was a student, invited him to appear before a moot court of professors including Josephine Potuto and William Lyons along with Professor Harnsberger. Moyer also spent several hours being questioned by a student seminar at Washington and Lee School of Law.

As befits a case attracting such distinguished amici, the case received significant media attention. It was the subject of an episode of *60 Minutes*, narrated by Mike Wallace, featuring George Moyer, William and Mary law professor Paul Marcus, and a supervisor from the Postal Inspection Service, who acknowledged that “the dealers of

child pornography have virtually been eliminated in this country,” which made them choose to target consumers to dry up the market.

The case was argued before the actual Supreme Court on November 6, 1991,<sup>61</sup> with Keith Jacobson in the audience. George Moyer appeared for Jacobson and Paul W. Larkin argued for the United States. One issue for the justices was the evidentiary import on the issue of predisposition of legal purchase of disreputable items. When Moyer proposed that “you can’t assume that somebody is going to engage in criminal activity, knowing that it is criminal, just because he has engaged in that activity when it was legal,” a justice responded “It depends on what that activity is. If it’s that kind of activity, just as if it would have been cocaine, I think one may, one may suspect that this is a person who does not care that much about societal norms.”<sup>62</sup> But Larkin admitted that “if what you’re asking is do I have any change in the law cases where on day – on a certain day something that was not previously illegal became illegal, I don’t have any case dealing with that problem.”

The justices also alluded to the defense of entrapment by estoppel, when the government gives an individual the idea that conduct is legal, then prosecutes them for it.<sup>63</sup> Larkin stated that an undercover officer could say “to somebody this is, you know, a new designer drug and it’s not yet been listed on the Attorney General’s . . . prohibited list, in that context the defendant I don’t think is able to say that the Government misled

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<sup>61</sup> See Transcript, 1991 WL 636288.

<sup>62</sup> Is it possible that Justice Scalia had forgotten that cocaine was once sold over the counter and included in widely used patent medicines, such as Coca Cola? See David Musto, *The American Disease: Origins of Narcotic Control* 3, 7 (Oxford 3d ed 1999).

<sup>63</sup> See *Raley v Ohio*, 360 US 423 (1959) (finding violation of due process for engaging in conduct that government officials had mistakenly stated was permitted); *United States v Batterjee*, 361 F3d 1210 (9th Cir 2004) (applying doctrine); Model Penal Code § 2.04(3)(b) (“A belief that conduct does not legally constituted a defense is a defense to prosecution for that offense based on such conduct when [a defendant] acts in reasonable reliance on an official statement of the law, afterward determined to be invalid or erroneous”).

him.” Justice Scalia replied, “You just lost me, Mr. Larkin. I think you’ve gone too far now.”

The Justices were also interested in how a decision in Jacobson’s favor would affect other common investigative techniques. Moyer suggested that a government pawn shop seeking to purchase stolen goods would be perfectly permissible even though there was no particular evidence about anyone who might come in, because the predisposition would be evident; indeed, they would have actually committed the theft, burglary or robbery before any contact with the government. Moyer also said that placing an ad for child pornography in a magazine would be entirely an acceptable investigative method, because the only people who would respond would be those who already had an interest in such material.

After the argument, Jacobson stated to reporters that Americans had a right to be “let alone unless you’re involved in a type of criminal activity. I was not running any kind of pornographic enterprise. I just figure that if I had been left alone I wouldn’t have bought it.” Jacobson added; “I’m not saying I did the right thing here. I did make a mistake.”

On April 6, 1992, the Court reversed Jacobson’s conviction in a 5 to 4 decision written by Justice White for himself and Justices Blackmun, Souter, Stevens and Thomas. The description of the Court’s consideration of the case in the book *Courting Justice* shows that many minds were changed after argument. Justice O’Connor was assigned to write a 7-2 affirmance; only White and Stevens supported reversal. *Courting Justice* suggests that “White’s very human argument swiftly swept Blackmun and Thomas to

Jacobson’s side.”<sup>64</sup> Justice Souter supplied the fifth vote. Justice O’Connor’s majority opinion became a dissent, and Justice White’s dissent a reversal.

The central legal ruling was the particular moment that the government was required to prove that predisposition existed: “Where the Government has induced an individual to break the law, and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”<sup>65</sup> The dissenters claimed this was a novel holding; the majority claimed that it was existing law. Neither was able to cite to a specific clear holding, although in *Sherman*, the Court held that the question was the defendant’s disposition “at the time [the agent] approached him.”<sup>66</sup> In any event counsel for the United States conceded the point at oral argument.<sup>67</sup>

An equally important development was in the rigor with which the Court enforced the principle. The Court recognized that even someone who was ultimately persuaded to do something quite wrong could nevertheless be the beneficiary of the defense.

Ordering and receipt of *Bare Boys* was not enough to prove predisposition: “It may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes, but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing

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<sup>64</sup> Murdoch & Price, *Courting Justice* at 412 (cited in note 46) (citing Hutchinson, *Whizzer White*, at 421 (cited in note 47)). A book about Justice Clarence Thomas’s contentious confirmation hearings suggests that his experience made him more sympathetic to Jacobson: “A former clerk explained that after all Thomas has gone through, the justice was especially sensitive to the overreaching powers of prosecutors.” Jane Mayer & Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* 358 (Houghton Mifflin 1994).

<sup>65</sup> 503 US at 549.

<sup>66</sup> 356 US at 375.

<sup>67</sup> 503 US at 549 n2.

predisposition.”<sup>68</sup> It was also significant that what Jacobson did was lawful. “Evidence of predisposition to do what was once lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law’s prohibitions are matters of consequence.”<sup>69</sup> This conclusion is eminently consistent with the finding of entrapment in *Sherman*, where the defendant had previously been convicted of precisely the same conduct, but was nevertheless not predisposed as a matter of law.

The Court also emphasized the political nature of the inducement. “[T]he strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner’s interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.”<sup>70</sup> “[T]he two solicitations in the spring of 1987 raised the spectre of censorship while suggesting that petitioner ought to be allowed to do what he had been solicited to do.”<sup>71</sup> Given Jacobson’s experience working on newspapers, the Court’s conclusion that a First Amendment argument could have been influential was quite reasonable.

Thus, Jacobson’s readiness at the end of the process did not suggest predisposition at the beginning. “The evidence that [Jacobson] was ready and willing to

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<sup>68</sup> Id at 550.

<sup>69</sup> Id at 551.

<sup>70</sup> Id at 552.

<sup>71</sup> Id at 552.

commit the offense came only after the Government had devoted 2 ½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law.”<sup>72</sup> The Court concluded: “In their zeal to enforce the law . . . Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce the commission of the crime so that the Government may prosecute.”<sup>73</sup>

The Court made clear that its holding was based largely on the long period of persuasion. Other investigative techniques, where a mere opportunity is presented, would not constitute entrapment. Accordingly, an agent “may offer the opportunity to buy or sell drugs,” and if the government “simply offered petitioner the opportunity to order child pornography through the mails, and petitioner—who must be presumed to know the law—had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction.”<sup>74</sup>

Justice O’Connor dissented in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, and partially joined by Justice Scalia. The dissent understood the facts quite differently. “Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times, he asked for opportunities to buy more.”<sup>75</sup> Unlike *Sherman* and *Sorrells*, there was no face to face contact; merely mailings which could have been thrown away. The questionnaires and solicitations were not sinister efforts to create a child abuser where none existed before,

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<sup>72</sup> Id at 553.

<sup>73</sup> Id at 548.

<sup>74</sup> Id at 549-50.

<sup>75</sup> Id at 554.

but were instead designed to screen out innocent recipients; they were legitimate efforts “to make sure he was generally interested in the subject matter.”

The dissent objected to the idea that predisposition had to exist before the operation started; instead “the inquiry is whether a suspect is predisposed before the Government induces commission of the crime, not before the Government makes initial contact with him.”<sup>76</sup> One problem with the majority’s rule might be that it would be “misread by lower courts as well as criminal investigators as requiring that the Government must have sufficient evidence of a defendant’s predisposition *before it ever seeks to contact him.*” This would amount to a requirement that “the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed.” But the dissent’s warning dispelled any danger of misreading the majority opinion, and no circuit now requires reasonable suspicion before beginning an investigation.

The dissent also feared that the case would give rise to a proliferation of entrapment defenses:

a bribetaker will claim that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered. A drug buyer will claim that the description of the drug’s purity and effects was so tempting that it created the urge to try it for the first time. In short, the Court’s opinion could be read to prohibit the Government from advertising the seductions of criminal activity as part of its sting operation, for fear of creating a predisposition in its suspects.

Of course, the 26 month process Jacobson experienced is easily distinguishable from these scenarios. But apart from that, the principle of the majority’s decision might justify a response that the government should not systematically “advertise the seductions of

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<sup>76</sup> Id at 556-57.

criminal activity” to persons who are presently unsexuated. If the enticements do not work, then prohibiting them is no loss. If they do, then more business is generated for the criminal justice system, but only among people who evidently would not otherwise have committed crimes. The government sent out child pornography advertisements to numerous people including many who were not prosecuted because they never ordered from the government front organizations; it is conceivable that some of them were encouraged by the arguments and suggestions, but found an outlet for their newfound prurient interests elsewhere.<sup>77</sup> To create actual pedophiles in order to prosecute non-pedophiles is a poor trade.

The dissent also challenged the majority’s conclusion that purchase of *Bare Boys* was insufficient to prove predisposition; instead, “this should have settled the matter.” Because of the majority’s emphasis on the legal nature of the purchase, the dissent suggested that perhaps the majority was adding a new element: “Not only must the Government show that a defendant was predisposed to engage in the illegal conduct, here receiving photographs of minors engaged in sex, but also that the defendant was predisposed to break the law knowingly in order to do so.”<sup>78</sup> This objection was a misunderstanding of what the majority did; the majority explicitly upheld the idea that ignorance of the law is no excuse.<sup>79</sup> Justice Scalia did not join this part of the dissent.

The relevant question is not whether the government has knowledge of prior criminal conduct or other evidence of predisposition before beginning the investigation,

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<sup>77</sup> Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum L Rev 209, 212 (2001) (“I suggest that child pornography law and the eroticization of children exist in a dialectic of transgression and taboo: The dramatic expansion of child pornography law may have unwittingly heightened pedophilic desire.”).

<sup>78</sup> 503 US at 559-60.

<sup>79</sup> Id at 550 (noting that defendants “must be presumed to know the law”); id at 551 n.3 (“We do not hold, as the dissent suggests . . . that the Government was required to prove that petitioner knowingly violated the law. We simply conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations” is insufficient to prove predisposition beyond a reasonable doubt).

but whether the predisposition in fact exists at the time of the initial government contact, regardless of the government's knowledge about any specific individuals. Thus, in an undercover drug purchase or sale, the government may not even know the names of potential targets, but when individuals propose criminal transactions when they first meet the (undercover) police, predisposition is clear.

The majority also had a compelling argument that the lawful nature of Jacobson's prior conduct was relevant. Of course, prior conduct of the same or similar nature may be probative, unless there is some reason that deprives it of evidentiary value about the defendant's state of mind at the relevant time. It is relevant to predisposition that a person charged with unlawful possession of an automatic weapon often eagerly possessed automatic weapons in the past, but much less so if the possession was lawful, say, incident to service in the Marine Corps. It is relevant to predisposition that a person charged with a drug offense is a prior drug user, less so if they, like Sherman, are in treatment to kick the habit. And it is suggestive of predisposition that an individual is interested in certain kinds of sexual materials or has purchased them in the past, but less so if they did so legally.

All past acts diminish in probative value with the passage of time, because if they are not repeated, they show that any predisposition no longer exists or has been, until the governmental involvement, successfully resisted. Obedience to the law in spite of a contrary impulse is certainly conduct that the government should respect and encourage,<sup>80</sup> and it is probably true as an empirical matter that the overwhelming majority of criminal impulses are resisted.

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<sup>80</sup> Renunciation or abandonment is a defense in some jurisdictions to criminal attempt or conspiracy. See Model Penal Code § 5.01(4) ("it is an affirmative defense [to the crime of criminal attempt] that [the

In this case, there is a basis to speculate about what would have happened without governmental involvement. Keith Jacobson had a contact for this material, Electric Moon, and a list of adult bookstores. If he had not merely an interest in this material but also an inclination to purchase it illegally, he could easily have attempted to do so without the government's help. The fact that legal materials and correspondence were found in the search of his house, but no other child pornography, goes a long way to showing that any curiosity Jacobson had had been sated, until the government came on the scene.

Keith Jacobson, not surprisingly, was relieved by the decision. "I felt like a big weight had been lifted from my shoulders," he said. "Now, I want to get on with my life, live a normal life. I plan on staying around here. I plan not to get involved in that kind of thing. I will watch my mail more closely."

#### *The Immediate Impact of Jacobson*

Many newspaper editorials praised the Court's decision. No mainstream outlet had any sympathy for child pornography of course, but they did support the idea that people were entitled to be left alone unless they committed a crime. The *Washington Post* called the government's conduct "entrapment, plain and simple."<sup>81</sup> The *Denver Post* editorial was entitled "Postal Snoops Went Too Far," and described "federal law enforcement gone berserk."<sup>82</sup> The *Chicago Tribune* decried "Fighting Crime by Inducing It."<sup>83</sup> Columnist Clarence Page wrote that "[t]he cleverness of the mailed bait

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defendant] abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances representing a complete and voluntary renunciation of his criminal purpose").

<sup>81</sup> Editorial, *Entrapment, Plain and Simple*, Wash Post, Apr 10, 1992, at A26.

<sup>82</sup> Editorial, *Postal Snoops Went too Far*, Denver Post, Apr 15, 1992, at 6B.

<sup>83</sup> Editorial, *Fighting Crime by Inducing It*, Chicago Tribune, Apr 7, 1992, at 16.

would astonish Wile E. Coyote.”<sup>84</sup> Locally, the *Omaha World-Herald* editorialized that Jacobson “never should have been arrested or charged.”<sup>85</sup>

The U.S. Attorney for the District of Nebraska claimed that the decision “will not change anything with regard to traditional law enforcement sting operations,” but this was optimistic. The 1980 Attorney General’s Guidelines on FBI Undercover Operations<sup>86</sup> differed from those in effect by 2002.<sup>87</sup> There were some minor changes in phraseology—entrapment “must” be scrupulously avoided instead of “should”; the “illegal” nature of the activity should be apparent to potential participants instead of “corrupt.” There was also a change in the definition of entrapment, which tracks the language of *Jacobson*: “Entrapment occurs when the Government implants in the mind of a person who is not otherwise disposed to commit the offense the disposition to commit the offense and then induces the commission of that offense in order to prosecute.”

### *The Continuing Importance of Jacobson Today*

The *Jacobson* case may have importance simply because the sexual orientation of the defendant seems not to have destroyed his chances in court. According to authors Joyce Murdoch and Deb Price, “[b]efore 1992, a Supreme Court majority opinion never expressed the slightest empathy for any homosexual.”<sup>88</sup>

The case was also important for criminal law. In the words of Judge Richard Posner, *Jacobson* “changed the landscape” and “breathed new life into the entrapment

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<sup>84</sup> Clarence Page, *Government Went to Obscene Lengths*, St Louis Post Dispatch, Apr 9, 1992, at 3C.

<sup>85</sup> Editorial, *Justice For Nebraskan*, Omaha World-Herald, Apr 7, 1992 at 16.

<sup>86</sup> *Attorney General’s Guidelines on FBI Undercover Operations* (Dec. 31, 1980), reprinted in Select Committee to Study Undercover Activities of the Department of Justice, S. Rep. 97-682, at 551 (1982).

<sup>87</sup> *The Attorney General’s Guidelines on Federal Bureau of Investigation Undercover Operations* (May 30, 2002).

<sup>88</sup> Murdoch & Price, *Courting Justice* at 406 (cited in note 46).

defense.”<sup>89</sup> Before *Jacobson*, “the courts of appeals had been drifting toward the view . . . that the defense of entrapment must fail in any case in which the defendant is ‘willing’ in the sense of being psychologically prepared to commit the crime for which he is being prosecuted, even if it is plain that he would not have engaged in criminal activity unless inveigled or assisted by the government.”<sup>90</sup> This view, said Judge Posner, “cannot be squared with *Jacobson*.”

Professor Paul Marcus opined that *Jacobson* brought entrapment “back from the [almost] dead.”<sup>91</sup> In the wake of *Jacobson*, Professor Marcus explains, “many courts have exhibited a willingness, rarely seen before, to find entrapment as a matter of law where government involvement is extensive.”<sup>92</sup> Predictably, many of these cases involve drug stings.<sup>93</sup> *Sorrells* and *Sherman* both involved entrapment with respect to substances; among the most famous recent cases of entrapment were the acquittal of automobile executive John DeLorean on cocaine charges, and of Washington, D.C. mayor Marion Barry for using crack. Juries and courts, it seems, can be sympathetic to claims of entrapment in drug cases, perhaps because they imagine that many people could be similarly targeted.

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<sup>89</sup> *United States v Hollingsworth*, 27 F3d 1196, 1198 (7<sup>th</sup> Cir 1994) (en banc).

<sup>90</sup> 27 F3d at 1198.

<sup>91</sup> Paul Marcus, *Presenting, Back from the [Almost] Dead, the Entrapment Defense*, 47 Fla L Rev 205 (1995).

<sup>92</sup> *Id* at 225.

<sup>93</sup> See e.g., *United States v Brooks*, 215 F3d 842 (8<sup>th</sup> Cir 2000); *United States v Martinez*, 122 F3d 1161 (9<sup>th</sup> Cir 1997); *United States v Skarie*, 971 F2d 317 (9<sup>th</sup> Cir 1992); *United States v Groll*, 992 F2d 755 (7<sup>th</sup> Cir 1993) (vacating guilty plea to allow assertion of entrapment defense to drug and firearm charge); *United States v Beal*, 961 F2d 1512 (10<sup>th</sup> Cir 1992); *State v Blanco*, 2004 WL 86646 (Fla App 2004) (relying in part on the attractiveness of the undercover agent involved); *Curry v State*, 876 So2d 29 (Fla App 2004); *Dial v State*, 799 So2d 407 (Fla App 2001); *People v Kulwin*, 593 NE2d 717 (Ill App 1992); *State v Johnson*, 511 NW2d 753 (Minn App 1994).

Other cases follow *Jacobson* in child pornography cases involving elaborate stings,<sup>94</sup> and even in the more serious circumstance of attempted sex crimes against children. Citing *Jacobson*, Judge Alex Kozinski wrote for a panel of the Ninth Circuit finding entrapment as a matter of law where the defendant had been convicted of crossing state lines for the purpose of engaging in sex acts with a minor.<sup>95</sup> The sting was similar to the one used against Jacobson, but taken to a higher level of intensity. The defendant answered an online ad for an adult sex partner. He initially responded with confusion to his email correspondent's insinuations about his role as the "special man teacher" for the teen and pre-teen children of his email pen pal, but, after much prodding, ultimately agreed to have sexual contact with them. He was sentenced to 121 months after he traveled from Florida to California to carry out this plan, but the Ninth Circuit reversed. In the words of *Jacobson*, the defendant was an "otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law." "There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and reality."<sup>96</sup> The Nebraska Supreme Court reached the same result on similarly disturbing facts.<sup>97</sup>

Courts have found entrapment as a matter of law for other offenses. The Florida Supreme Court found entrapment in a case where adult videos were rented to a minor;<sup>98</sup> the Indiana Court of Appeals found entrapment as a matter of law when a driver

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<sup>94</sup> *Farley v State*, 848 So2d 393 (Fla App 2003).

<sup>95</sup> *Poehlman v United States*, 217 F3d 692 (9<sup>th</sup> Cir 2000).

<sup>96</sup> *Id* at 705.

<sup>97</sup> *State v Canaday*, 641 NW2d 13, (Neb 2002).

<sup>98</sup> *Munoz v State*, 629 So2d 90 (Fla 1993).

responded to a street solicitation from an undercover vice officer.<sup>99</sup> The Florida District Court of Appeals<sup>100</sup> and the Fifth Circuit<sup>101</sup> have found entrapment as a matter of law in financial cases.<sup>102</sup>

The Court's impassioned decision in *Jacobson* gives rise to an interesting question that the Court may never answer. Doctrinally, *Jacobson* rested on the approach taken in *Sorrells*, namely that the entrapment defense was available as a matter of statutory construction;<sup>103</sup> it could do so because Congress has never purported to eliminate the defense. But what if it did? If Congress explicitly authorized the government to "originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime to that the Government may prosecute,"<sup>104</sup> something the Court clearly considered quite unjust, the Court would be forced to explain whether government creation of crime in this manner was consistent with the due process clause.

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<sup>99</sup> *Ferge v State*, 764 NE2d 268 (Ind App 2002).

<sup>100</sup> *State v Finno*, 643 So2d 1166 (Fla App 1994).

<sup>101</sup> *United States v Sandoval*, 20 F3d 134 (5th Cir 1994).

<sup>102</sup> See also *People v Karraker*, 633 NE2d 1250 (Ill App 1994) (weapons charge; entrapment as a matter of law).

<sup>103</sup> 503 US at 553.

<sup>104</sup> *Id* at 548.