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CRIMINAL LAW—UNITED STATES v. HOLLINGSWORTH: THE ENTRAPMENT DEFENSE AND THE NEOPHYTE CRIMINAL—WHEN THE COMMISSION OF A CRIMINAL ACT DOES NOT CONSTITUTE A CRIME

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CRIMINAL LAW—United States v. Hollingsworth. The Entrapment Defense and the Neophyte Criminal—When the Commission of a Criminal Act Does Not Constitute a Crime

Introduction

On April 6, 1992, the United States Supreme Court decided Jacobson v. United States.\(^1\) In this case, the defendant’s conviction for the illegal receipt of child pornography through the mails was reversed when the Court permitted the defendant to assert the entrapment defense. The majority in Jacobson\(^2\) upheld the defendant’s entrapment defense since the government failed to show that the defendant was predisposed to commit the criminal act prior to the government’s intervention.\(^3\) Justice O’Connor argued in dissent that the Court’s holding changed the entrapment doctrine,\(^4\) and that the Court’s holding “has the potential to be misread by lower courts . . . as requiring that the Government must have sufficient evidence of a defendant’s predisposition before it ever seeks to contact him.”\(^5\) This assertion augured true when the United States Court of Appeals for the Seventh Circuit decided United States v. Hollingsworth.\(^6\)

In Hollingsworth, the court of appeals relied on Jacobson and reversed the conviction of two alleged money launderers on the basis that they were entrapped by the government’s sting operation.\(^7\) The court concluded that, if the defendants, Hollingsworth and Pickard, were left on their own, they would not have engaged in any illegal activity.\(^8\) Therefore, the defendants were not “ready” to

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2. Id. Justice White delivered the opinion of the Court. Justice Blackmun, Justice Stevens, Justice Souter, and Justice Thomas joined in this judgment.
3. Id. at 542. The Court held that, as a matter of law, the government did not prove that the defendant was “predisposed, independent of the Government’s acts and beyond a reasonable doubt.” Id.
4. Id. at 555-56. In her dissent, Justice O’Connor was joined by Chief Justice Rehnquist, Justice Kennedy, and by Justice Scalia (except as to part II).
5. Id. at 557 (emphasis omitted).
6. 27 F.3d 1196 (7th Cir. 1994).
7. Id. A sting operation is an undercover police technique in which the law enforcement officer poses as a criminal to trap law violators. Id. at 1200.
8. Id. at 1202.
commit the crime when the government commenced the sting operation. In dissent, Judge Ripple echoed the words of Justice O'Connor and indicated that the majority’s decision in *Hollingsworth* altered the entrapment defense significantly by adding a new and independent hurdle for the government to surmount. Judge Ripple labelled the new element of the majority’s entrapment defense as "readiness to act." 9

This Note examines whether the Court of Appeals for the Seventh Circuit’s decision in *Hollingsworth* has significantly altered the entrapment defense by either: (a) redefining the element of "pre-disposition to commit the crime" to require the component of "readiness,"10 or (b) by establishing "readiness" as a distinct and independent element of this defense. In order to perform this analysis, Part I of this Note begins by examining the evolution and history of the entrapment defense. The Supreme Court’s decision in *Jacobson* will next be reviewed in detail. This discussion will provide a proper framework for the evaluation in Part II of the validity of the *Hollingsworth* court’s interpretation of the entrapment defense standard. In Part III, this Note concludes that the court in *Hollingsworth* erred in interpreting *Jacobson*, and that, while "readiness" is an important factor in the determination of predisposition, it should not be considered as a distinct and independent element of the entrapment defense. The final section of the Note proposes that courts utilize the “totality of the circumstances” test to evaluate a defendant’s predisposition to commit a crime when a defense of entrapment is asserted.

I. BACKGROUND

Generally, entrapment occurs for the purpose of obtaining evidence of an illegal act, when a law enforcement official or an undercover agent originates the idea of a particular crime in the mind of an individual. 11 This inducement then causes the person to commit the crime, which the person is not otherwise disposed to do. 12 Traditionally, the entrapment defense had two elements: first, that

9. *Id.* at 1214.
10. The entrapment defense is usually stated as having two elements: (1) government inducement of the crime; and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct. See, e.g., *Mathews v. United States*, 485 U.S. 58, 62-63 (1988).
there was a governmental inducement of the defendant to commit the crime;\textsuperscript{13} and second, that the defendant was not predisposed to commit the crime.\textsuperscript{14}

The determination of governmental inducement is usually clear on the facts of the reported case and is normally not disputed by the government.\textsuperscript{15} However, ever since this defense was first accepted by the Supreme Court,\textsuperscript{16} there has been general disagreement about the true definition and meaning of the term "predisposition."\textsuperscript{17}

Historically, it is has been a commonly held principle that only the blameworthy should be found criminally responsible for their actions.\textsuperscript{18} Acknowledging this axiom, the Supreme Court recognized the need to distinguish between the "unwary innocent" and the "unwary criminal."\textsuperscript{19} The Court decided that an individual who is independently predisposed to commit a crime should be prosecuted, even if the criminal activity was induced by governmental intervention.\textsuperscript{20} However, the Court stated that the government may not "play[ ] on the weakness[ ] of an innocent party and be­guile[ ] him into committing crimes which he otherwise would not have attempted."\textsuperscript{21} Therefore, the task for the Supreme Court in developing the entrapment defense was to formulate a test that would enable it to determine which individual was criminally culpable and which was genuinely "entrapped." Two distinct tests were advanced: the objective test and the subjective test.\textsuperscript{22} The following

\begin{footnotes}

\textsuperscript{13} Mathews, 485 U.S. at 62-63.

\textsuperscript{14} Id.

\textsuperscript{15} United States v. Hollingsworth, 27 F.3d 1196, 1215 (7th Cir. 1994).

\textsuperscript{16} The first time that the Supreme Court considered the entrapment defense was in Sorrels v. United States, 287 U.S. 435 (1932). However, the entrapment defense was first presented before a federal court years earlier in Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

\textsuperscript{17} See generally, Brian Thomas Feeney, Note, Scrutiny For the Serpent: The Court Refines Entrapment Law in Jacobson v. United States, 42 CATH. U. L. REV. 1027 (1993) (an in-depth analysis of the subjective and objective definitions of predisposition).


\textsuperscript{20} See Sorrells, 287 U.S. at 441. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commis­sion of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." Id.

\textsuperscript{21} Sherman, 356 U.S. at 376.

\textsuperscript{22} See generally, Erich Weyand, Comment, Entrapment: From Sorrells To Jacob­son—The Development Continues, 20 OHIO N.U. L. REV. 293 (1993).
\end{footnotes}
subsections provide a brief overview of the historical development and judicial treatment of these two distinct tests.

A. The Evolution of the Entrapment Defense Doctrine

In its first decision directly considering the entrapment defense, the Supreme Court, in Sorrells v. United States, applied the subjective approach in its entrapment analysis. In Sorrells, government agents used significant psychological persuasion and multiple requests before the defendant reluctantly acquiesced to sell them prohibited alcohol. The Court agreed that the defendant was "entrapped" and stated that law enforcement officials exceed their authority when 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." Thus, Chief Justice Hughes examined the predisposition of the defendant as well as whether there was the presence of any unlawful intent on the part of the defendant.

In his concurrence in Sorrells, Justice Roberts disagreed with the focus of the majority's analysis and suggested that the Court should have focused solely on the government's conduct in determining the issue of entrapment. In advocating the objective approach, Justice Roberts felt that the judicial system should not condone outrageous law enforcement techniques even if the defendant was predisposed to commit criminal acts. Justice Roberts reasoned that "[e]ntrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." The Supreme Court next examined the entrapment defense in Sherman v. United States. In his majority opinion, Chief Justice Warren declared that entrapment is established as a matter of law.

24. Id. Sorrells dealt with law officials' attempts to discover individuals illegally selling alcohol. In this case, the defendant was convicted under the National Prohibition Act. Id. at 438-41.
25. Id. at 440.
26. Id. at 442.
27. Id. at 459 (Roberts, J., concurring).
28. Id. at 454 (Roberts, J., concurring) (emphasis added).
29. 356 U.S. 369 (1958). Sherman involved a defendant who was convicted for selling narcotics to a government informer. The defendant initially resisted the agent's requests for drugs, but, after numerous pleas, he finally sold the drugs to the agent and was arrested. Id. at 373.
when the government agent originated the criminal design, planted it in the mind of an innocent defendant, and as the result of the urging of the government agent, the defendant subsequently committed the crime.\(^{30}\) Therefore, as in Sorrells, the Court relied on the subjective state of mind of the defendant as it related to his willingness to commit the illegal act.

Justice Frankfurter concurred in Sherman but advocated the use of the objective approach. In criticizing the subjective approach, Justice Frankfurter explained that "[t]he courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced."\(^{31}\) The approach advocated by Justice Roberts in Sorrells and Justice Frankfurter in Sherman is that the Court must focus its examination on the police conduct that induced, aided, or encouraged the commission of the illegal act without considering the specific state of mind of the defendant.\(^{32}\)

In 1973, the Supreme Court decided Russell v. United States.\(^{33}\) In Russell, the defendant was convicted of purchasing phenyl-2-propanone, an ingredient necessary in the manufacture of methamphetamine, from an undercover law enforcement agent. The Court, in rejecting the defendant's entrapment defense, held that governmental conduct is irrelevant to the determination of entrapment, once predisposition has been established.\(^{34}\) Therefore, the Warren Court affirmed the use of the subjective approach.

In Hampton v. United States,\(^{35}\) the Court reaffirmed that the subjective approach was the appropriate analysis for determinations of entrapment.\(^{36}\) The Court held that governmental conduct, no matter how outrageous or onerous, did not factor into the en-

30. Id. at 372. See also United States v. Dougherty, 810 F.2d 763, 769 (8th Cir. 1987) (discussing the requirements necessary for a finding of entrapment as a matter of law).
31. Sherman, 356 U.S. at 380 (Frankfurter, J., concurring).
34. Id. at 436. However, the Court in Russell also hinted at the fact that they might reverse a conviction if the government's tactics were so outrageous as to violate the Due Process Clause. Id. at 431-32.
35. 425 U.S. 484 (1976). In Hampton, the defendant was charged with selling narcotics to an undercover government agent. Id. at 484-85.
36. Id. at 488.
Enforcement of a predisposed defendant. 37

Predisposition has been called the principal element of the entrapment defense, 38 and lower courts have wrestled with the problem of properly defining this requirement. 39 The issue of predisposition focuses on whether "the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." 40 Thus, the Supreme Court deemed the predisposition requirement to be essential in order to bar the use of the entrapment defense by defendants who would have committed the crime even without government intervention. 41

The courts have interpreted the predisposition element as having several distinct meanings. The Supreme Court has stated that a defendant's ready response cannot in itself be enough to establish predisposition and that some additional factor is required. 42 The United States Court of Appeals for the Second Circuit indicated that a "willingness," in the sense of being psychologically prepared to commit the crime, is necessary for the entrapment defense to fail. 43 Some courts of appeals have even devised multi-prong tests to facilitate the determination of a criminal predisposition. 44

37. Id. at 488-89. "The defense that the government's conduct was so outrageous as to require reversal on due process grounds is often raised but is almost never successful. No Supreme Court case and only two court of appeals opinions have set aside convictions on that basis." United States v. Gamble, 737 F.2d 853, 857 (10th Cir. 1984). See, e.g., United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); Greene v. United States, 454 F.2d 783 (9th Cir. 1971).

The subjective approach was reaffirmed by the Court in Mathews v. United States, 485 U.S. 58, 66 (1988), as the proper test for ascertaining the validity of the entrapment defense. In Mathews, Justice Brennan indicated that he bowed to stare decisis and accepted the Court's choice of the subjective approach. However, many states have decided to adopt the objective approach of determining entrapment for state cases. See, e.g., State v. Zaccaro, 574 A.2d 1256, 1263 (Vt. 1990); People v. Barraza, 591 P.2d 947, 956 (Cal. 1979).


39. Compare Commonwealth v. Miller, 282 N.E.2d 394, 400 (Mass. 1972) (adopting the subjective approach for the predisposition analysis); State v. Decker, 14 S.W.2d 617, 620 (Mo. 1929) (adopting the subjective approach for the predisposition analysis) with People v. Turner, 210 N.W.2d 336, 342 (Mich. 1973) (adopting the objective approach for the predisposition analysis); People v. Moran, 463 P.2d 763, 766 (Cal. 1970) (adopting the objective approach for the predisposition analysis).

40. Mathews, 485 U.S. at 63.


43. United States v. Ulloa, 882 F.2d 41, 44 (2d Cir. 1989).

44. Compare United States v. Blackman, 950 F.2d 420, 423 (7th Cir. 1991) (five
From the Supreme Court's first recognition of the entrapment defense in \textit{Sorrells} to the Court's decision in \textit{Mathews}, the entrapment defense doctrine had greatly changed.\textsuperscript{45} During this period, the concept of predisposition evolved from being simply a pertinent factor in the entrapment analysis\textsuperscript{46} to the controlling question of whether the defendant was a person otherwise innocent, who was induced by the government agents to commit the crime.\textsuperscript{47} In 1992, in \textit{Jacobson v. United States},\textsuperscript{48} the Supreme Court recognized that, notwithstanding this doctrinal evolution, the appellate courts varied in their analyses of the entrapment defense and that the elements of this doctrine required further clarification.

B. Jacobson v. United States\textsuperscript{49}

In \textit{Jacobson v. United States},\textsuperscript{50} the Supreme Court attempted to clarify the concept of predisposition. Keith Jacobson, a 56 year-old part test used to determine predisposition) \textit{with United States v. Dion}, 762 F.2d 674, 687-88 (8th Cir. 1985) (ten part test used to determine predisposition), \textit{rev'd on other grounds}, 476 U.S. 734 (1986). The test adopted by the United States Court of Appeals for the Seventh Circuit includes the following factors:

\begin{itemize}
  \item[(1)] the character or reputation of the defendant;
  \item[(2)] whether the suggestion of criminal activity was originally made by the government;
  \item[(3)] whether the defendant was engaged in criminal activity for profit;
  \item[(4)] whether the defendant evidenced reluctance to commit the offense, overcome by government persuasion; and
  \item[(5)] the nature of the inducement or persuasion offered by the government.
\end{itemize}

\textit{Blackman}, 950 F.2d at 423.

The United States Court of Appeals for the Eighth Circuit gave a more elaborate list of elements to be considered in examining predisposition:

\begin{itemize}
  \item[(1)] whether the defendant readily responded to the inducement offered;
  \item[(2)] the circumstances surrounding the illegal conduct;
  \item[(3)] the state of mind of a defendant before government agents make any suggestion that he shall commit a crime;
  \item[(4)] whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged;
  \item[(5)] whether the defendant had already formed the design to commit the crime for which he is charged;
  \item[(6)] the defendant's reputation;
  \item[(7)] the conduct of the defendant during negotiations with the undercover agent;
  \item[(8)] whether the defendant has refused to commit similar acts on other occasions;
  \item[(9)] the nature of the crime charged; and
  \item[(10)] the degree of coercion present in the instigation law officers have contributed to the transaction relative to the defendant's criminal background.
\end{itemize}

\textit{Dion}, 762 F.2d at 687-88 (citations and quotations omitted).

\textsuperscript{45} For a discussion on the evolution of the entrapment defense, see \textit{supra} notes 23-44 and accompanying text.
\textsuperscript{46} \textit{Sorrells v. United States}, 287 U.S. 435 (1932).
\textsuperscript{49} 503 U.S. 540 (1992).
\textsuperscript{50} \textit{Id}. 

Nebraska farmer, was charged with violating the provisions of the Child Protection Act\(^{51}\) for receiving pictures of minors engaged in sexual conduct. Jacobson claimed that “the Government entrapped him into committing the crime through a series of communications from undercover agents during the 26 months before his arrest.”\(^{52}\)

The government initiated the investigation after it learned that Jacobson previously had legally received a magazine depicting nude preteen and teenage boys in the mail.\(^{53}\) In the ensuing “2 1/2 years, repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal”\(^ {54}\) were carried out to induce Jacobson to break the law. In reversing Jacobson’s conviction, the Supreme Court held that the government had failed to prove that the defendant was independently predisposed to commit the crime.\(^{55}\)

In its analysis, the Court noted that “the Government had no evidence that petitioner had ever intentionally possessed or been exposed to [illegal] child pornography . . . other than [from] the Government.”\(^ {56}\) The Court conceded that Jacobson had become predisposed to break the law after two and one half years of inducement, but that the Government had failed to prove that Jacobson’s predisposition was “independent and not the product of the attention that the Government” had directed towards him.\(^ {57}\) The Court stated that “‘the Government [may not] pla[y][sic] on the weakness of an innocent party and beguil[e] him into committing crimes which he otherwise would not have attempted.’”\(^ {58}\) The Court held that when a defendant raises the defense of entrapment, the burden falls on the prosecution to prove, beyond a reasonable doubt, that the defendant was predisposed to perpetrate the illegal act prior to being approached by the undercover agents.\(^{59}\) Justice White concluded his majority opinion by remarking: “When the Govern-


\(^{52}\) Jacobson, 503 U.S. at 542.

\(^{53}\) Id. at 542-43. Within three weeks of Jacobson’s receipt of these magazines, BARE BOYS I and BARE BOYS II, the law relating to child pornography changed. Congress made it illegal to receive through the mail sexually explicit depictions of children.

\(^{54}\) Id. at 543.

\(^{55}\) Id. at 542.

\(^{56}\) Id. at 546.

\(^{57}\) Id. at 550.

\(^{58}\) Id. at 553 (quoting Sherman v. United States, 356 U.S. 369, 376 (1958)).

\(^{59}\) The majority stated that the premise that the suspect must be predisposed
ment’s quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene.\textsuperscript{60}

As previously noted, Justice O’Connor dissented for several reasons. First, she believed that the defendant was predisposed to commit the crime because “[Jacobson] needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies, friendship, or suggested that his committing the crime would further a common good.”\textsuperscript{61} Thus, Jacobson was not only willing to commit the crime, but was also enthusiastic to do so. Secondly, Justice O’Connor also criticized the Court for changing the entrapment defense and holding that the “Government must [now] prove not only that a suspect was predisposed to commit the crime before the opportunity to commit it arose, but also before the Government came on the scene.”\textsuperscript{62} Justice O’Connor believed that Jacobson’s predisposition was clearly demonstrated by his ready complaisance and the absence of any reluctance to perpetrate the crime. She argued that the rule set down by the Court would impede future undercover sting operations, as the government would be prohibited from “advertising the seduction of criminal activity for fear of generating a predisposition in its suspects.”\textsuperscript{63} Justice O’Connor’s concerns soon materialized, when the Court of Appeals for the Seventh Circuit relied on Jacobson in United States v. Hollingsworth\textsuperscript{64} and held that two alleged money launderers had been entrapped as a matter of law and should have been acquitted of money laundering.\textsuperscript{65}

\section*{II. United States v. Hollingsworth\textsuperscript{66}}

This section of the Note is divided into four subsections. First,
a description of the pertinent facts of the *Hollingsworth* case is presented. Second, the district court's opinion is summarized. The third subsection provides a detailed analysis of the Court of Appeals for the Seventh Circuit's holding in *Hollingsworth*. The concluding subsection presents a comprehensive review of the opinions offered by the court's dissenting judges.

**A. Case Facts**

In order to increase their income, the defendants, Hollingsworth, a farmer, and Pickard, a dentist, decided to become international financiers. They formed a Virgin Islands corporation, CIAL, to conduct international banking. Within a short period, the business was in poor financial shape, and the defendants decided to sell their Grenadian banking license to raise additional working capital. They advertised this sale in *U.S.A. Today*.

The defendants were contacted by J. Thomas Rothrock, a United States Customs agent, who thought that this advertisement might be a front for illegal money laundering. On his second attempt to contact Pickard, Rothrock told Pickard that he had money from an organization and wanted to deposit it offshore. Initially, Pickard suggested several “legal” methods by which Rothrock could achieve his stated goals, but later suggested that Rothrock could either “structure” a large cash deposit to avoid federal reporting requirements, or he could deposit the money outside the United States. Pickard later retracted this second option, stating that it was illegal. After being contacted several

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67. *Id.* at 1200.
68. *Id.*
70. J. Thomas Rothrock was a United States customs agent based in Indianapolis, Indiana, who, on the date of the *USA Today* ad, was attending a money laundering symposium. Knowing that foreign banks are sometimes involved in money laundering schemes, Rothrock assumed that someone who wanted to sell one might also be interested in money laundering. *Hollingsworth*, 27 F.3d at 1200.
71. The first time that Rothrock called Pickard and Hollingsworth he left a message, but the call was never returned. Rothrock succeeded in contacting the defendants with his second telephone call. *Id.*
72. “Structuring” money is the term used for taking large sums of money, breaking them down into sums of less than $10,000, and depositing them in different banks in order to avoid federal banking reporting regulations. The court found no evidence that Pickard knew that this was an illegal act. *Id.* at 1209.
73. *Id.* at 1201.
times by the defendants, Rothrock initiated "a formal investigation to determine the past and present unlawful activities of William Pickard."74

After a period of setbacks that lasted approximately six months,75 Rothrock reestablished contact with Pickard and presented him with $20,000 of "sting money" that he had obtained from his superiors. Rothrock told Pickard that the money came from gun smuggling. Pickard then took the "sting money" and, in exchange, transferred money from his own account to that of Rothrock, charging Rothrock a fee of approximately ten percent for his services.76 When the defendants subsequently attempted to launder another large sum of money for Rothrock, they were arrested.77 The defendants were charged with money laundering and related offenses in violation of federal law.78

B. District Court Opinion79

William Pickard filed a motion to have the indictment against him dismissed.80 He claimed that the government's conduct was outrageous and that the government had targeted him for investigation without a reasonable suspicion of previous illegal conduct.81 Pickard also argued that the government had manufactured his crime through repeated requests and coercion.82

The district court found no outrageous conduct on the part of the government officials83 and held that Pickard had failed to show

74. Id.
75. The investigation ground to a halt between August 20, 1990, and February 9, 1991, as Pickard refused to deal with Rothrock on a transient basis. Id.
76. Id. Subsequent transactions brought the total amount of money laundered by Pickard (and Hollingsworth) to $200,000.
77. When Pickard was arrested he was carrying with him a false passport allegedly issued by the non-existent Dominion of Melchizedek. Id.
78. Id. at 1198.
80. Id. at 156.
81. Id.
82. Id.
83. The district court stated that "great leeway is granted law enforcement agents, and absent a violation of an independent constitutional right, governmental misconduct must be 'truly outrageous' before due process considerations will be implicated to prevent a conviction." Id. at 157 (quoting United States v. Kaminski, 703 F.2d 1004, 1009 (7th Cir. 1983)). For a general discussion of the constitutional ramifications of "outrageous" government conduct, 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 Governments and Its Agents, 7 W. NEW ENG. L. REV. 1 (1984).
"with sufficient clarity" any evidence of "sentencing entrapment." The district court disregarded the defendant's allegations that the government agents directed the relationship between the parties to money laundering and that they manipulated him into committing the offense. In rejecting this claim, the court stated that, since there was at least some evidence relating to Pickard's predisposition to commit the crime, a defense of entrapment as a matter of law must fail.

C. United States Court of Appeals for the Seventh Circuit

Majority Opinion

After having been found guilty of money laundering and related offenses, Hollingsworth and Pickard appealed their convictions to the Court of Appeals for the Seventh Circuit. The majority of the court felt that the government "turned two harmless, though weak, foolish, and in Pickard's case at least, greedy, men into felons" through the use of entrapment. The court of appeals, therefore, reversed the district court's holding and acquitted the two defendants. The court based the decision to acquit the defendants on its analysis of Jacobson v. United States, which it believed significantly altered the entrapment defense doctrine.

According to the Hollingsworth court, Jacobson demonstrated...
that willingness to commit a criminal act is insufficient to prove predisposition. 91 If it was sufficient, then Jacobson, who showed no reluctance to buy the pornographic material, would have been convicted. The court also pointed to the last sentence of the Jacobson analysis as being of primary importance. In Jacobson, Justice White concluded his opinion by stating: "When the government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."92

The court in Hollingsworth interpreted this last sentence of Jacobson to mean that a court must look beyond the mental state of the defendant in order to determine predisposition.93 Thus, the majority in Hollingsworth stated that predisposition was made up of two components. The first component is a "positional" factor, while the second component represents the "dispositional force" of the defendant.94 The majority defined the "positional" component by indicating that the "defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so."95 The court felt that Hollingsworth and Pickard would not have been in the "position" to commit the criminal act if it were not for the government's intervention.96 Since a criminal predisposition produced by government conduct cannot be used to frustrate the entrapment defense, the defendants had to be acquitted.97

The majority also held that Jacobson stood for the proposition that, in order to defeat predisposition, the government had to prove that the suspect was predisposed to commit the crime before the government ever contacted the suspect, not before the government

91. Hollingsworth, 27 F.3d at 1198.
92. Id. at 1199 (citing Jacobson, 503 U.S. at 553-54).
93. Id. at 1199-1200.
94. Id. The court denied that it had added a new element to the entrapment defense but argued that it had merely redefined predisposition according to the guidelines set down by the Supreme Court in Jacobson. Id.
95. Id. at 1200.
96. In discussing the "dispositional" component, the majority in Hollingsworth conceded that the defendants were willing to perpetrate the crime. However, the majority acquitted the defendants because the government could not establish that the defendants were in the "position" to commit the crime. Id. at 1202. For an analysis of the Hollingsworth decision, see infra part III.
97. Hollingsworth, 27 F.3d at 1201.
proposed the commission of the illegal act to the defendant. The court found no evidence that Pickard or Hollingsworth had even considered the notion of engaging in money laundering before they were contacted by the government agent. Therefore, clear criminal predisposition could not be shown by the government.

The court hypothesized that the outcome of the case would have been different if the defendants' business had been up-and-running, since then they would have been in the "position" to engage in the actus reus before the government arrived on the scene. Thus, the entrapment defense fails when the government furnishes the opportunity to commit a crime to an individual who already had the idea for the illegal act but lacked only the present means to commit the crime. However, since in this case Pickard and Hollingsworth were not "ready" to commit the crime, the court found that the defendants had been entrapped as a matter of law.

D. United States Court of Appeals for the Seventh Circuit

1. Judge Coffey's Dissent

Judge Coffey asserted that the majority misinterpreted Jacobson. Judge Coffey stated that a valid defense to entrapment has two elements: governmental inducement and a lack of predisposition. Judge Coffey believed that while Jacobson altered the en-

98. Id. at 1202. See Jacobson v. United States, 503 U.S 540, 548 (1992) ("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.").

99. The evidence shows that, before being contacted by the government agent, the defendants' business was about to fail. The court found that since the defendants had "no background, resources, or connections . . . [they] had no prayer of becoming money launderers without the Government's aid." Hollingsworth, 27 F.3d at 1202.

100. Id.

101. The court indicated that "[a] person who is likely to commit a particular type of crime without being induced to do so by Government agents, although he would not have committed it when he did but for that inducement, is a menace to society and a proper target of law enforcement." Id. at 1203.

102. In the case of Hollingsworth, the government claimed that there could be no defense of entrapment, since Hollingsworth was induced by Pickard, a private citizen. However, the court adopted the doctrine of "derivative entrapment." The court held that there is a defense of derivative entrapment "when a private individual, himself entrapped [Pickard], acts as agent or conduit for governmental efforts at entrapment, the government as principal is bound." Id. at 1204.

103. Id. at 1205 (Coffey, J., dissenting).


105. Hollingsworth, 27 F.3d at 1205 (Coffey, J., dissenting). See supra notes 11-48 and accompanying text for a general discussion of the entrapment defense.
trapment defense by limiting the measures which the government agents could utilize in attempting to induce an otherwise "law-abiding citizen" to violate the law, it did not strictly limit the focus of law enforcement undercover operations to "nonlaw-abiding citizens." Therefore, according to Judge Coffey, "[w]hat is important in this type of entrapment case is not the defendant's 'position' or 'readiness' but whether the Government went to great lengths to prepare the defendant to take the bait." Since, in the case at bar, the jury found the defendants' claim of entrapment to be without merit, this decision should have been upheld.

Under Judge Coffey's approach for determining predisposition, both defendants would fail to establish a lack of predisposition. The suggestion for criminal activity was initially made and pursued by the defendants. The defendants were engaged in criminal activity for profit and never showed any reluctance to commit the crime. In addition, the government did not have to offer the defendants any inducement to commit the crime. The opportunity that was presented by the government was one that a law-abiding citizen would have refused.

2. Judge Ripple's Dissent

Judge Ripple concluded that the majority in Hollingsworth ad-
ded a completely new element to the entrapment defense doctrine and "departed radically... from the governing precedent of the Supreme Court of the United States." Judge Ripple explained that the entrapment defense did not allow the dismissal of prosecutions for "overzealous law enforcement." Instead, this doctrine should be utilized to protect an individual who commits a crime only as a result of governmental inducement.

According to Judge Ripple, the majority's decision introduced a new and independent hurdle for the government to surmount. The government must not only establish that the alleged criminal was predisposed to commit the crime prior to the government's initial contact with the defendant, but now must also establish the "readiness" of the defendant. This alteration to the entrapment defense was found to run contrary to precedent, which has always held that predisposition concerns the suspect's state of mind or intent. The introduction of this new element into the entrapment defense was said to have changed both the doctrine and policy concerns identified by the Supreme Court in past decisions.

The defendant's state of preparation or "readiness" prior to the presentation of the opportunity to commit the crime is no doubt relevant to the issue of predisposition. However, this state of readiness is not an independent element of the defense. Judge Ripple considered "readiness" as "circumstantial evidence that is relative and probative evidence of whether the defendant was in fact predisposed to commit the offense."

stated that "[i]solated phrases do not alter the law when the bulk of an opinion professes otherwise." Therefore, he believed that because Hollingsworth and Pickard were willing to break the law when given the opportunity, their defense of entrapment should fail. 

114. Id. at 1213.
115. Id. at 1213-14.
116. Id. at 1214 (quoting United States v. Russell, 411 U.S. 423, 435 (1973)). In Russell, Justice Rehnquist stated: "the defense of entrapment... was not intended to give to the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." Russell, 411 U.S. at 435.
117. Hollingsworth, 27 F.3d at 1214.
118. Id. at 1214 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)). See also supra part I (discussing the Supreme Court's adoption of the subjective test for the entrapment defense).
119. See supra notes 11-48 and accompanying text for a general discussion of the entrapment defense.
120. Hollingsworth, 27 F.3d at 1214-15 (Ripple, J., dissenting).
121. Id. at 1214. See also United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952). In Sherman, Judge Learned Hand treated the concept of "readiness" as a factor to be used in the determination of predisposition. Id.
A defendant's ready response to a government agent's invitation to engage in crime has also been utilized to establish predisposition. However, Judge Ripple asserted that the majority's decision altered the meaning of the term "ready" from referring to one who is "inclined" or "willing" to one who "is on the verge" of committing a crime. This alteration in the doctrine of the entrapment defense places the Seventh Circuit at odds with all the other circuits. It is the only court to permit those defendants that desire to commit a crime and end up perpetrating that crime to go unpunished "simply because, for whatever reason, [the defendant] does not have his act together when afforded an opportunity by an undercover agent."

Judge Ripple concluded that Jacobson did not provide any support for the majority's requirement that the government must prove "that the defendant has sufficient aptitude and equipment to commit the crime." Judge Ripple feared that disorganized neophyte criminals would be able to take advantage of this requirement and hide behind the entrapment defense even though they enthusiastically engaged in the criminal act. Judge Ripple stated that this use of the entrapment defense contravenes both the intent of Congress and the teachings of the Supreme Court.


123. Hollingsworth, 27 F.3d at 1215-16 (Ripple, J., dissenting). See United States v. Ulloa, 882 F.2d 41, 44 (2d Cir. 1989) (affirming the trial court's decision that the government does not have to show that the defendant was fully prepared to act or have the present physical ability to act in order to prove the existence of predisposition).

124. See, e.g., United States v. Mendoza-Salgado, 964 F.2d 993, 1002 (10th Cir. 1992) (stating that predisposition may be established by evidence of the defendant's readiness or willingness to commit the crime); United States v. Ventura, 936 F.2d 1228, 1230-31 (11th Cir. 1991) (adopting the analysis that the defense of entrapment must fail in any case in which the defendant is willing).

125. Hollingsworth, 27 F.3d at 1216 (Ripple, J., dissenting).

126. Jacobson v. United States, 503 U.S. 540 (1992). Judge Ripple suggests that Justice O'Connor's interpretation of Jacobson may be correct. In her dissent, Justice O'Connor read the majority's opinion in Jacobson "to require that the government not only establish that the defendant had a pre-existing propensity to engage in the underlying conduct but also that he had the pre-existing propensity to violate the law in order to engage in that conduct." Hollingsworth, 27 F.3d at 1216 (Ripple, J., dissenting) (citing Jacobson, 503 U.S. at 559-60).

127. Hollingsworth, 27 F.3d at 1217 (Ripple, J., dissenting).

128. Judge Ripple concluded his dissent by criticizing the majority's acceptance of the doctrine of "vicarious [or derivative] entrapment." Judge Ripple stated that without direct government contact with the defendant, there is no basis for an entrapment
III. Analysis

This Section analyzes the Court of Appeals for the Seventh Circuit’s decision in *Hollingsworth* in relation to Supreme Court precedent on the entrapment defense. It also evaluates the potentially significant consequences that *Hollingsworth* may have on the law enforcement community. The Section concludes with a suggestion of how the Supreme Court should resolve the conflict that exists among the courts in their implementation of the entrapment defense.

A. Significance of United States v. Jacobson

The Court of Appeals for the Seventh Circuit stated in *Hollingsworth* that *Jacobson* substantially changed the framework of the entrapment defense. *Jacobson* can be thought to stand for three points. First, in order for the entrapment defense to fail, the government must show that the defendant was predisposed to commit the crime independent of any government intervention. Second, *Jacobson* clearly stands for the proposition that the defendant must be predisposed to commit the crime prior to any contact with law enforcement officers. Finally, the third principle found in the *Jacobson* decision comes from the penultimate paragraph of the opinion. In this paragraph, Justice White stated: “When the Government’s quest for defense. Additionally, he invited the Supreme Court to determine if the majority’s modification of the entrapment defense is appropriate. *Id.* at 1218-19.


130. *Hollingsworth*, 27 F.3d at 1198. See also United States v. Groll, 992 F.2d 755, 760 (7th Cir. 1993) (stating that the Supreme Court’s decision in *Jacobson* had “breath[ed] new life into the entrapment defense”); United States v. Olson, 978 F.2d 1472, 1483 (7th Cir. 1992) (referring to “the new standard enunciated in *Jacobson*”).

131. *Jacobson*, 503 U.S. at 542. See also supra part I.B (summarizing the required elements of the entrapment defense).

The Supreme Court stated that the government failed to meet its burden of proof and show that Mr. Jacobson would have ordered the pornographic materials without governmental interference. The Court pointed out that after the government agents arrested Jacobson, a search of his house found “no other materials that would indicate that petitioner collected or was actively interested in child pornography.” *Id.* at 551-52.

132. *Id.* at 553. In order to emphasize this point, the Court stated that “[i]n their zeal to enforce the law . . . agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission so that the government may prosecute.” *Id.* at 548 (citing Sorrells v. United States, 287 U.S. 435, 442 (1932)). The Supreme Court indicated that evidence that the suspect was predisposed to commit the crime prior to contact with the government can either originate from evidence developed prior to the “sting” operation or from evidence gained during the progression of the governmental investigation. *Id.* at 550.
convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."\textsuperscript{133} Some commentators have suggested that this phrase is an attempt by the Court to look beyond the mental state or \textit{mens rea} of the defendant in the determination of entrapment and to examine the "totality of the circumstances," including, but not limited to, the conduct of the law enforcement officers.\textsuperscript{134} These commentators have stated that the Supreme Court has therefore correctly recognized the objective approach as an important factor in the predisposition analysis.\textsuperscript{135} The majority in \textit{Hollingsworth} relied on this same statement to substantiate their inclusion of the "positional" or "readiness" approach to the doctrine of entrapment.\textsuperscript{136}

\textbf{B. Application of the Jacobson Analysis to United States v. Hollingsworth}\textsuperscript{137}

The dissent in \textit{Hollingsworth} accused the majority of redefining the entrapment defense and adding a new element of "readiness" to the analysis.\textsuperscript{138} The majority responded that it merely redefined the element of predisposition according to the guidelines set down by the Supreme Court in \textit{Jacobson}.\textsuperscript{139} Thus, to ascertain whether the court of appeals properly applied the \textit{Jacobson} analysis to the facts in \textit{Hollingsworth}, a close scrutiny of the legal reasoning utilized by the majority and dissent is required.

In order to decide if the \textit{Hollingsworth} defendants were entrapped under the \textit{Jacobson} analysis, it must be determined whether the defendants were independently predisposed to commit the crime of money laundering before their contact with the government agents.\textsuperscript{140} The \textit{Hollingsworth} majority went to great lengths to describe the defendants' lack of sophistication and financial acumen.\textsuperscript{141} The majority claimed to have examined the defend-

\begin{thebibliography}{99}
\bibitem{133} Id. at 553-54.
\bibitem{134} \textit{See} Feeney, \textit{supra} note 17, at 1030; \textit{see also} Weyand, \textit{supra} note 22, at 299.
\bibitem{135} For a discussion on the objective approach, see \textit{supra} part I.A.
\bibitem{136} United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir. 1994).
\bibitem{137} 27 F.3d 1196 (7th Cir. 1994).
\bibitem{138} \textit{Id.} at 1214. \textit{See also} supra part II.D.2.
\bibitem{139} \textit{Id.} at 1199-1200. Chief Judge Posner wrote: "We do not suggest that \textit{Jacobson} adds a new element to the entrapment defense — 'readiness' or 'ability' or 'dangerousness' on top of inducement . . . . Rather, the [Supreme] Court clarified the meaning of predisposition." \textit{Id.}
\bibitem{141} \textit{Hollingsworth}, 27 F.3d at 1202.
\end{thebibliography}
ants' behavior both prior to and during the government operation and concluded that "Pickard and Hollingsworth had no prayer of becoming money launderers without the Government's aid." The court found that the defendants' banking business was in such financial upheaval that, if it had not been for the governmental intervention, the business would have gone into bankruptcy. The court also indicated that, although the defendants were in drastic financial straits and could have perpetrated any number of criminal acts to raise capital, there was no proof that they even contemplated, let alone acted, to become money launderers. The majority, however, focused only on the totality of the defendants' physical, psychological, and financial circumstances before the governmental intervention and seemed to overlook Pickard's conduct once presented with the opportunity to break the law.

In contrast, the dissenters focused their analysis solely on the defendants' conduct subsequent to the initiation of the governmental investigation. The dissent stated that the defendants not only showed little reluctance in accepting Rothrock's invitation to launder money, but also actively pursued a relationship with him. The dissent indicated that the reluctance that Pickard did demonstrate was not a fear of breaking the law, but a fear that all criminals have: the fear of apprehension and conviction. In response to this evidence, the majority conceded that the defendants were willing to perpetrate the crime, but stated that Pickard and Hollingsworth were "less willing than Jacobson had been to violate the federal law against purchasing child pornography through the mails." For example, Pickard did demonstrate some reluctance to commit a crime when he retracted his own suggestion that he could illegally "structure" Rothrock's money.

The majority in Hollingsworth stated that the government had the burden "[of] prov[ing] beyond a reasonable doubt that a defendant who raises a colorable defense of entrapment . . . has not in

142. Id. The court found that prior to his attempt to become an international financier, Pickard's past financial failures included: (a) movie theatres; (b) amusement parks; (c) apartment buildings; and (d) his wife's cookbooks. Id.
143. Id.
144. Id. at 1200.
145. Id. at 1207-08. Judge Coffey stated that "[c]ritical to the analysis of the defendants' predisposition is that after [Rothrock's] first contact, it was the defendants who initiated four separate phone calls and aggressively pursued the relationship." Id.
146. Id. at 1202.
147. Id. at 1201. For a discussion of the Hollingsworth facts, see supra part II.A.
fact been entrapped.”148 The majority found that the government did not meet the burden of showing that the defendant was predisposed before and independent of the government’s intervention.149 Before Jacobson, the Supreme Court held that a defendant’s predisposition was measured at the time that the law enforcement officer first suggested the crime to the defendant, not when they first came into contact.150 Under this standard, after Hollingsworth and Pickard had entered into a relationship with Rothrock, the government would have been able to prove that they were predisposed to perpetrate a crime.151 Once presented with the opportunity and capital, Pickard and Hollingsworth were all too “ready” to become international money launderers. Therefore, under pre-Jacobson analysis, the fact that the defendants were willing and able to launder money prior to the government’s actual solicitation152 would suggest that their entrapment defense should fail.

However, under the Jacobson analysis, the court must now determine if the defendants were predisposed to commit the act before any government contact is initiated.153 This requirement would create a difficult burden on the law enforcement community, as law enforcement personnel now would be required to present sufficient proof that the defendant would be inclined to commit the crime before an investigation could even be commenced.154 Justice O’Connor suggested in Jacobson that “this rule has the potential to be misunderstood by lower courts as requiring that the law enforcement officers must have a reasonable suspicion of criminal activity before the initiation of a ‘sting’ operation.”155

The majority in Jacobson held that Keith Jacobson had been

148. Id. at 1203 (citing Jacobson v. United States, 503 U.S 540 (1992)).
149. Id. at 1199.
150. See Jacobson, 503 U.S. at 556 for a discussion of the Supreme Court’s treatment of the element of predisposition prior to Jacobson.
151. The trial record demonstrated that in the first “significant” meeting between the parties, Pickard proposed an illegal act to Rothrock. Hollingsworth, 27 F.3d at 1207.
152. The majority conceded that anyone is able to commit the act of money laundering, as “all that [is] involved in the act [is] wiring money to a bank account designated.” Id. at 1202.
154. Hollingsworth, 27 F.3d at 1217 (Ripple, J., dissenting).
155. Justice O’Connor feared that some courts would interpret the majority opinion in Jacobson to require a finding of reasonable suspicion before the government could contemplate a sting operation. Justice O’Connor pointed out that the “Court deny[d] that its new rule [would] affect the run-of-the mill sting operations.” Jacobson, 503 U.S. at 557.
entrapped as a matter of law because the "Government [had] overstepped the line between setting a trap for the 'unwary innocent' and the 'unwary criminal,' and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime."156 This was the Jacobson holding. The statement made by the Court in the penultimate paragraph of the opinion, that the entrapment defense should be applied when the court determines that the defendant was a "law-abiding citizen who, if left to his own devices,"157 would not have perpetrated the crime, was not essential to the standard announced by the Court. The function of this phrase was to delineate the proper factual scenario for the subsequent application of the entrapment defense doctrine by the lower courts.158

Therefore, the Hollingsworth court should have utilized the phrase "if left to his own devices"159 to determine whether the entrapment defense doctrine was applicable to Pickard and Hollingsworth. This initial analysis was not carried out by the court. Instead, the Hollingsworth court improperly viewed the phrase "if left to his own devices" as a shorthand for the element of "readiness." If this hypothesis is correct, then the Court of Appeals for the Seventh Circuit would have had no real basis for its examination of the defendant's "position" as well as his "disposition" in the evaluation of the entrapment defense claim.160

Since the court of appeals had found that Pickard and Hollingsworth were "unwary innocents" who if "left to [their] own devices"161 would not have perpetrated the crime, then, pursuant to Jacobson, the entrapment defense should have been applied without any further analysis. The court's finding would have indicated that the defendants were not "independently predisposed" to com-

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157. Id. at 553-54.
158. The Jacobson majority stated:
    "We are "unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

Id. at 553 (quoting Sorrells v. United States, 287 U.S. 435, 448 (1932)).
159. Id. at 553-54.
160. For a discussion of the requirements of the entrapment defense, see supra part I.B.
mit the crime of money laundering. Thus, the phrase "if left to his own devices" was meant to act as a threshold test for the application of the entrapment defense and not as the basis for a new element of the entrapment defense: the "readiness" requirement.

C. The Role of "Readiness" in the Entrapment Defense Doctrine

1. Readiness as a Relevant Factor in the Determination of Predisposition

Even though the Court of Appeals for the Seventh Circuit stated that Hollingsworth did not add a new element of "readiness" to the entrapment defense, its analysis of the entrapment defense was different before Jacobson. For example, in United States v. Evans, the court indicated that predisposition could be assumed to be present in an individual who is induced to commit a crime without the use of grave threats, fraud, or "extraordinary promises—the sorts of promises that would blind the ordinary person to his legal duties." If this rationale were to be applied to Hollingsworth, then it would appear that the defendants' entrapment defense would necessarily fail. The government agent, Rothrock, never threatened the defendants with physical injury or promised them that their conduct was legal. Rothrock did offer the defendants financial gains, but the amount received by Pickard and Hollingsworth would not have been sufficient, under the standard in Evans, to "blind the ordinary person." Therefore, it would appear that, prior to Jacobson, Hollingsworth and Pickard would have satisfied the Seventh Circuit's existing definition of predisposition and would have been convicted of their crimes. Under this interpretation, readiness or ability to commit the crime can be seen as one relevant, but not independent, factor in the predisposition

162. Id. at 542.
163. Id. at 553-54.
164. Before Jacobson, the Court of Appeals for the Seventh Circuit's analysis of the entrapment defense focused on the defendant's willingness to commit the crime. See, e.g., United States v. Cervante, 958 F.2d 175, 179 (7th Cir. 1992) (stating that the most important factor in the predisposition analysis is whether the defendant demonstrated any reluctance to engage in the criminal act); United States v. Manzella, 791 F.2d 1263, 1269 (7th Cir. 1986) (holding that predisposition was equivalent to being "ready and willing" to commit the crime).
165. 924 F.2d 714, 715-16 (7th Cir. 1991) (involving a conviction for a drug transaction where the defendant attempted to utilize the entrapment defense).
166. Id. at 717.
167. In all, the defendants together profited less than twenty thousand dollars over a six month period. United States v. Hollingsworth, 27 F.3d 1196, 1209 (7th Cir. 1994).
analysis. Even if the government conceded the fact that Hollingsworth and Pickard were not "ready" to commit the crime when they were first approached by the government agent, predisposition could still have been shown to have been present by a myriad of other factors.168

2. Readiness Used as a Third Prong of Entrapment

After Jacobson, the United States Court of Appeals for the Seventh Circuit required that the entrapment defense analysis specifically include a determination of whether the defendant was "ready" or in the "position" to commit the crime.169 Therefore, the court in Hollingsworth evaluated the defendants' personal background and sociological environment. The court found that Hollingsworth and Pickard were not familiar or experienced with the money laundering business.170 Neither Hollingsworth nor Pickard had prior convictions for money laundering, nor did they move in the money laundering milieu. Therefore, they were not prepared to take the steps necessary to complete the actual crime without the government's assistance. This line of reasoning would appear to be flawed in Pickard's case.171 Pickard was able to efficiently and effortlessly carry out the money laundering process, even though he did not possess the devices that the majority suggested were prerequisites to the commission of the crime.

A close examination of the significant events found in Hollingsworth reveals the following: (a) the government induced Pickard and Hollingsworth to commit a crime; (b) based on their lack of reluctance to launder money after being given the opportunity, Hollingsworth and Pickard appeared willing to commit the criminal act; (c) the defendants had no prior criminal records; (d) the defendants had no experience or prior training in the field of international finance, but they were still able to interest one investor in their banking venture; (e) the defendants' international banking business was failing and in desperate need of capital; and, most cru-

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168. See discussion supra part II.D.

169. “Predisposition is not a purely mental state, the state of being willing to swallow the Government's bait. It has positional as well as dispositional force.” Hollingsworth, 27 F.3d at 1200. See supra part II.C. for a discussion of the positional and dispositional components of the entrapment defense.

170. See United States v. Kussmaul, 987 F.2d 345, 349-50 (6th Cir. 1993) (familiarity with the illegal act considered relevant to the determination of predisposition).

171. Hollingsworth, 27 F.3d at 1202. The court stated that a professional money launderer must possess "underworld contacts, financial acumen or assets [and] access to foreign banks or bankers." Id.
cial, (f) the defendants actually did launder money for Rothrock on multiple occasions.\footnote{172}{Id. at 1201.}

Evaluating these facts under the \textit{Jacobson} analysis, it would seem that Hollingsworth and Pickard were predisposed to commit this crime. The government did not need to go to extreme lengths to induce their participation. The defendants were willing to commit the crime and eager to establish a long-term money laundering relationship with Rothrock. Pickard admitted at trial that he proposed the illegal money structuring transaction in his first telephone conversation with Rothrock. Additionally, the court found that it was the defendants who re-established contact with Rothrock after a six month interruption in the government investigation.\footnote{173}{Id. at 1207.} Since these facts in the aggregate demonstrate that the defendants were predisposed to commit the crime prior to, and independent of, the government intervention, they should be sufficient to establish predisposition according to \textit{Jacobson}, and the entrapment defense should fail.

Nevertheless, the majority in \textit{Hollingsworth} stated that predisposition was not established because the defendants could not be said to be “on the verge” of committing the criminal act when the government commenced the investigation.\footnote{174}{Id. at 1203. The court stated that the entrapment defense would fail if “the defendant had the idea for the crime all worked out and lacked merely the present means to commit it.” \textit{Id.}} If the \textit{Hollingsworth} court had utilized “readiness” as one of several factors pertinent to the determination of predisposition,\footnote{175}{See supra note 44 for a discussion of pertinent factors in the predisposition analysis.} but not as a separate and independent prong of the entrapment analysis, then these other factors would have clearly demonstrated the existence of predisposition.\footnote{176}{The courts have consistently held that the “most important [but not only] factor . . . is whether the defendant evidenced ‘reluctance to engage in criminal activity.’” United States v. Casanova, 970 F.2d 371, 375 (7th Cir. 1992) (quoting United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir. 1985)).} While the evidence that the government possessed before the commencement of the “sting” operation did not conclusively prove predisposition, it was sufficient to demonstrate predisposition when combined with evidence obtained during the course of the investigation. Therefore, the only reasonable explanation for the court’s acquittal of the defendants is that the government failed to meet the new and independent prong of the entrapment defense.
established by the Hollingsworth majority: the "readiness" requirement.\textsuperscript{177}

If the "readiness" prong is included in the Hollingsworth analysis, then it is insufficient for the government to show that it had not gone to extraordinary lengths to induce the defendants' acts and that the defendants were willing and agreeable to perpetrate the crime. Under this new standard, the government would additionally have to prove that the defendants were "on the verge" of committing the crime before the government intervened. Thus, evidence showing that the defendant was organized, prepared, trained, and equipped to commit the crime would be essential to establish this element. The Court of Appeals for the Seventh Circuit saw Hollingsworth and Pickard as inept neophytes who, if left to their own devices, would not have attempted to become international money launderers.\textsuperscript{178} The court simply did not believe that the defendants' "devices," specifically their background, education, experience, and sociological environment, would have led them down the road of crime.\textsuperscript{179} Since the government could not establish readiness, it did not satisfy the new third prong of the test necessary to defeat the entrapment defense.

D. \textit{Consequences of the Hollingsworth Decision on Sting Operations and on the Use of the Entrapment Defense}

1. Public Policy Considerations

The entrapment defense was designed to protect individuals who would likely not have committed a crime, were it not for the governmental interference in their lives.\textsuperscript{180} A sting operation is used to alter the timing of an offense so that a criminal can be caught and the public protected, not to create a lure that would catch the "unwary innocent."\textsuperscript{181} The courts have always held that, in order for a defendant to be held criminally responsible for an illegal act, the defendant must have had the "ability or power" to control his or her own conduct. This concept is demonstrated in the legal system's acceptance of defenses such as diminished capacity, insanity, and coercion.\textsuperscript{182} Similar to the entrapment defense, these

\begin{itemize}
\item \textsuperscript{177} See Hollingsworth, 27 F.3d at 1214 (Ripple, J., dissenting).
\item \textsuperscript{178} Id. at 1202.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Jacobson v. United States, 503 U.S. 540, 553-54 (1992); Sorrells v. United States, 287 U.S. 435, 441 (1932).
\item \textsuperscript{181} Jacobson, 503 U.S. at 553.
\item \textsuperscript{182} See, e.g., United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984)
\end{itemize}
doctrines suggest that, in some manner and to varying degrees, the defendant is not completely responsible for the formation of the mens rea and the commission of the actus reus.\textsuperscript{183} Therefore, courts are willing to acquit a criminal if it can be said that the criminal did not independently formulate the required criminal intent. This safeguard is one that American jurisprudence has utilized to protect the innocent.\textsuperscript{184}

On the other hand, it is evident that the law enforcement community must enforce the criminal laws in order to prevent chaos in our society. To further this end, courts have given the police considerable leeway in using undercover agents to detect and halt crime.\textsuperscript{185} One successful technique that has been used is the undercover "sting" operation. Such operations are not meant to incriminate innocent individuals, but instead to alter only the timing of the offense so that the suspect can be apprehended.\textsuperscript{186} As the court said in Hollingsworth, "[t]he defense of entrapment reflects the view that the proper use of the criminal law in a society such as ours is to prevent harmful conduct for the protection of the law abiding."\textsuperscript{187} Thus, the courts must balance these competing interests and devise a rule that will protect the innocent, while still allowing the government to punish the guilty. The entrapment defense and particularly the element of predisposition was contemplated to properly separate the "unwary innocent" from the "unwary criminal."\textsuperscript{188} The "readiness" prong added by the Court of Appeals for the Seventh Circuit would appear to have upset this delicate balance.

\textsuperscript{183} Mens rea has been defined as the "guilty mind" or the level of mental culpability necessary to be convicted of a crime. PHILLIP E. JOHNSON, CRIMINAL LAW 4 (4th ed. 1990). Actus reus is defined as the "guilty act" or "the physical aspect of the crime." BLACK'S LAW DICTIONARY 35 (6th ed. 1990).


\textsuperscript{185} See, e.g., Sorrells v. United States, 287 U.S. 435, 441 (1932) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises.").

\textsuperscript{186} United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994).

\textsuperscript{187} Id.

2. The Detrimental Effect That the "Readiness" Requirement Will Have on Law Enforcement

As was stated in the dissenting opinions in *Hollingsworth*, allowing readiness to become an independent element of the entrapment defense will be extremely burdensome for the law enforcement community. It will create a new obstacle that the government will have to satisfy, above and beyond the requirement of proving predisposition. The government will not only have to prove what the defendant did and how it was done, but also what "devices" enabled the defendant to commit the criminal act. This approach will allow defendants who had the mens rea and who have subsequently committed the actus reus to escape culpability simply because they were not initially "ready" when the government offered them the opportunity to act.

It would seem that disorganized neophyte criminals would be immune from prosecution under the *Hollingsworth* analysis simply because they were not yet skilled practitioners of the criminal act. Further, the competent and skilled lawbreaker who is "sufficiently studied in his way of doing business, so as to appear not too organized," will benefit from the court's analysis. Since a defendant's prior criminal record as well as previous associations with known criminals is a strong indication of "readiness," this new requirement will allow the criminal who is apprehended for the first time to escape conviction. This will permit clever defendants to use the guise of stupidity or naivete as a defense to their crime. Readiness, as an independent requirement to the entrapment doctrine, would contravene both American criminal jurisprudence and our societal goal of punishing the blameworthy.

189. See discussion supra part II.D.

190. In discussing the necessity of undercover sting operations Professor Herbert Packer stated: "Officials in the justice system are considered to be not only trustworthy, but also in need of maximum flexibility if they are to be successful in bringing crime under control." HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160-61 (1968).


192. Claims of stupidity or naivete have been commonly presented to the courts as explanations for a defendant's conduct. See, e.g., United States v. Johnson, 927 F.2d 999, 1004-05 (7th Cir. 1991) (defendant claimed that she was too unsophisticated to commit the crime); United States v. George, 869 F.2d 333, 334 (7th Cir. 1989) (noting defendant's claim of total unsophistication as a mitigating factor for his criminal behavior).
IV. Proposal: Utilization of the “Totality of the Circumstances” Approach in Determining Predisposition

The majority in Hollingsworth concluded that Jacobson stood for the proposition that predisposition goes beyond the mental state of the defendant.\(^\text{193}\) In describing the proper use of the entrapment defense, the Jacobson Court held that predisposition must be established before and independent of the government investigation. Additionally, the Court indicated that the entrapment defense should be implemented when it would appear that inducement was used on a “law abiding citizen who, if left to his own devices, likely would have never run afoul of the law.”\(^\text{194}\) This phrase, when read in conjunction with the Court’s finding that the government “overstepped the line between setting a trap for the ‘unwary innocent’ and the ‘unwary criminal,’”\(^\text{195}\) suggests that the Court is perhaps becoming more amenable to considering “objective approach” evidence as part of its entrapment defense analysis. This new test can be termed the “totality of the circumstances approach.”\(^\text{196}\) The totality of the circumstances approach focuses on all the circumstances of a particular case, rather than on any one factor in particular.\(^\text{197}\)

When evaluating a defendant’s predisposition, courts will not limit their scrutiny solely to the conduct of the law enforcement agency. Similarly, the courts will not condone police behavior that

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193. Hollingsworth, 27 F.3d at 1199.
195. Id. at 542.
196. Courts are familiar with the “totality of the circumstances” determination, as this test is used often in criminal procedure. See, e.g., Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (the totality of the circumstances must be evaluated to determine probable cause).
they deem outrageous or excessive. While the courts see willingness to act or an absence of reluctance on the part of the defendant to commit the crime as an important factor in the predisposition analysis, it should not be considered as the determinative factor. As part of the evaluation of predisposition, the courts also look at the criminal background of the defendant and the defendant's "position" or "readiness" to commit the crime. While all these elements are essential for a comprehensive determination of predisposition, no one factor should be an independent element of the entrapment defense.

The "totality of the circumstances" approach has been criticized by some commentators as being too vague and general. Other commentators have said that this approach permits courts to come up with results that promote law enforcement at the expense of individual rights. However, a thorough review of all the circumstances surrounding the governmental inducement and the suspect's illegal conduct would provide the fact finder with a complete picture of the alleged entrapment. Utilizing the totality of the circumstances test, the fact finder would be able to take all the mitigating circumstances of the situation into consideration. The absence of one factor, such as readiness, would then be balanced against the presence of the defendant's willingness to commit the crime and the extent of the inducement needed to provoke this conduct. Also, as part of the totality of the circumstances approach, the fact finder should attempt to determine the likelihood that the defendant would have committed the crime if the government had not intervened. If the fact finder discovers that the circumstances,

201. See, e.g., WAYNE R. LAFAVE, JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.3, at 143-45 (2d ed. 1992) (criticizing the totality of the circumstances test for not providing a concrete and specific framework for determining culpability).

In his dissent in Illinois v. Gates, 462 U.S. 213, 290 (1983), Justice Brennan criticized the totality of the circumstances test and stated that this standard presents "an overly permissive attitude towards police practices in derogation of the rights secured by the [Constitution]." Id. (Brennan, J., dissenting).
in the aggregate, show no predisposition, then the entrapment defense should be held valid. The burden would still rest on the government to show that predisposition existed beyond a reasonable doubt.

An analogous use of the totality of the circumstances approach can be found in the United States Supreme Court's analysis of probable cause. In United States v. Gates, the Supreme Court, in determining whether a law enforcement officer had sufficient justification to conduct a search or seizure, evaluated all the events surrounding the incident, including the defendant's criminal background and the probability that a criminal act would have been committed. The Court believed that the use of a flexible approach to evaluate probable cause was necessary to accurately analyze this fluid concept. Similarly, due to the variance in factual scenarios, modes of governmental inducement, and individual traits prevalent in an entrapment defense analysis, no one rigid test could possibly suffice. A standard that permits the fact finder to consider all the circumstances and make an informed decision is required.

If the totality of the circumstances approach had been applied to the facts of Hollingsworth, the defendants' entrapment defense would have failed. It could be argued that the defendants might not have been "ready" to commit the crime due to their unsophisticated criminal background and foolish nature. However, the facts, as found by the jury, confirmed that: (a) the government's inducement was clearly not excessive; (b) the defendants eagerly entered into the criminal activity; (c) the defendants suggested the criminal activity to the government agent; and (d) the defendants were so desperate for capital that it was likely that they would have engaged in a similar crime if given the opportunity. Therefore, when the events surrounding the sting operation are viewed collectively, Hollingsworth and Pickard would be unable to hide behind the protective shield of the entrapment defense.

203. Gates, 462 U.S. at 232. In Gates, the Court balanced all the circumstances related to an informant's tip in order to determine if the government's evidence had met the required level of suspicion. The Court held that balancing all the circumstances in the aggregate was necessary since "probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules. . . . [O]ne simple rule will not cover every situation." Id.

204. Id.
CONCLUSION

The entrapment defense is one of the safeguards built into the criminal justice system to protect the law-abiding citizen. Courts, however, have been unable to agree on an appropriate definition of a critical element of this defense, the lack of predisposition. While the Supreme Court's decision in Jacobson helped define the proper time to evaluate predisposition and the proper factual situations to which this defense should be applied, controversy has arisen regarding its effect on the definition of predisposition. Relying on Jacobson, the United States Court of Appeals for the Seventh Circuit in Hollingsworth held that the entrapment defense contained a "readiness" component. The court reasoned that predisposition had positional as well as dispositional force. Based on this interpretation, it ordered judgment of acquittal for two defendants convicted of money laundering because they were not prepared to take the steps necessary to commit the crime at the time the government first intervened. The court held that the defendants were neophytes who were incapable of money laundering without governmental assistance. Thus, the court ignored the defendants' willingness and eagerness to engage in criminal activity.

An analysis of the facts in Hollingsworth reveals that the court of appeals reformulated the entrapment defense by adding "readiness" as an independent element to this doctrine. This new prong of the entrapment doctrine allowed the two suspects to go free, even though they possessed both the mens rea and the actus reus required to be found criminally culpable. Therefore, the Hollingsworth majority acquitted two defendants whom many courts would have convicted. This result emphasizes the need for a new and standardized approach to predisposition.

Courts should adopt a "totality of the circumstances" approach when attempting to evaluate predisposition. This approach would consider all the factors surrounding the governmental inducement and the defendants' commission of the act in the aggregate. While no one element would be determinative, the fact finder, utilizing this approach, would be able to conduct an informed and fair inquiry into the existence of predisposition prior to the government's intervention. The totality of circumstances test would not only efficiently separate the "unwary innocent" from the "unwary criminal," but it would also eliminate an unnecessary burden on the law enforcement community in its attempt to protect society. Under the totality of the circumstances test, the neophyte money laun-
derer, just like any other criminal, would find no protection from an entrapment defense. While the law-abiding innocent must go free, the culpable malefactor must be incarcerated.

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