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## Entrapment when the Spoken Word Is the Crime

### Cover Page Footnote

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# ENTRAPMENT WHEN THE SPOKEN WORD IS THE CRIME

*James F. Ponsoldt\* and Stephen Marsh\*\**

## INTRODUCTION

THE year-long struggle between Kenneth Starr's Office of Independent Counsel ("OIC") and Monica Lewinsky received a great deal of public attention, particularly the nature of the unusual "deal" for transactional immunity negotiated between them. Now, perhaps, it is time for reflection upon one of the less publicized, but highly relevant issues, in the Lewinsky investigation: the uncertain parameters of the federal common law of entrapment, particularly in the context of white collar or mens rea crimes.

As is speculated in this Article, the OIC claimed to be in a position to indict Lewinsky and/or her mother for some form of obstruction of justice, possibly witness tampering,<sup>1</sup> based on tape recordings made by Linda Tripp. According to media commentators, particularly former prosecutors, this use of an agent/informant is not uncommon, nor is it controversial to employ informants to obtain evidence of a crime.<sup>2</sup>

While many have debated the morality of Tripp's private decision to tape Lewinsky, not enough attention has been paid to the

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1. See 18 U.S.C. §§ 1503, 1512 (1994). Indeed, the subsequent OIC report to Congress alleged that President Clinton and, by implication, Lewinsky, violated those statutes when devising and implementing "cover stories" to disguise their sexual relationship. See *The Report and The Response*, Atl.-J. Const., Sept. 12, 1998, at B1. Interestingly, the report refers to the January 13-15 conversations: "In a recorded conversation that day, January 15, Ms. Lewinsky encouraged Ms. Tripp not to disclose her (Lewinsky's) relationship with the President. Ms. Lewinsky tried to persuade Ms. Tripp to lie . . ." *Id.*

2. Wiring witnesses to obtain evidence of past criminal activity is not uncommon. Doing so to induce the crime, when the crime consists of spoken words (i.e., "lie for me" or "vote our way and there will be more money where this came from") is the focus of this Article. Allegedly, the key recording was a final one in which the OIC wired Tripp for another meeting with Lewinsky with instructions regarding the nature of the incriminating statements needed from Lewinsky (i.e., persuading Tripp to lie or withhold testimony). In other words, the OIC may have directed Tripp to induce Lewinsky to unambiguously commit the crime of witness tampering—a crime which probably would not have occurred without such a specific solicitation.

prosecutorial decision to subsequently wire Tripp with instructions to induce criminal conduct, in the nature of additional comments, from Lewinsky. This incident is the most public illustration of the need for a renewed focus on the highly ambiguous common law concept of "entrapment" in federal law, particularly when the criminal charge in question has, as a primary element, the uncertain and changing state of mind of the target because the spoken word is both the actus reus and the primary evidence of mens rea. That targets of criminal investigations may be "willing" or predisposed to commit an offense when directed by a government informant, but would not likely have committed such an offense without that direction, is the focus of debate still surrounding the Supreme Court's seven-year-old decision in *Jacobson v. United States*.<sup>3</sup>

Coloring the debate has been the recent practice of independent counsels, prior to the expiration of the independent counsel statute, to seek expansion of their jurisdiction when they uncovered collateral criminal conduct. In *United States v. Sun-Diamond Growers*,<sup>4</sup> the Supreme Court defined the mens rea element of the illegal gratuities statute as requiring proof that the defendant paid (or received) something of value "because of" a specific official act rather than unidentified or expected official acts in general, or the recipient's "official position."<sup>5</sup> The Court held that Sun Diamond, a donor to the former Secretary of Agriculture, Mike Espy, was entitled to have its criminal conviction vacated because "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."<sup>6</sup> The line was thus drawn between criminal conduct and traditional campaign contributions based upon the specific or non-specific mens rea of the donor or recipient (which may differ from one another).<sup>7</sup>

In an obstruction case, such as witness tampering, a jury is instructed that it must find beyond a reasonable doubt that the defendant acted "corruptly."<sup>8</sup> In *United States v. Farrell*,<sup>9</sup> the court

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3. 503 U.S. 540 (1992).

4. 119 S. Ct. 1402 (1999).

5. *See id.* at 1406.

6. *See id.* at 1411.

7. This is a fertile field for future entrapment decisions, whose resolutions should refine procedures used in targeting criminal defendants for prosecution.

8. In relevant part, 18 U.S.C. § 1512 provides: "(b) Whoever . . . corruptly persuades another person . . . with intent to . . . (2) . . . induce any person to (A) withhold testimony . . . ; (B) . . . conceal an object . . ." 18 U.S.C. § 1512 (1994). The OIG's Report to Congress characterizes several activities by President Clinton as witness tampering but the published excerpts lack any focus on the element of "corruptly." *See generally* Office of Independent Counsel, Referral to the United States House of Representatives pursuant to 28 U.S.C. § 595(c), H.R. Doc. No. 105-310 (2d Sess. 1998) (setting forth President Clinton's allegedly corrupt activities, including perjury for which he was subsequently impeached). The same element must

recognized that, “the phrase ‘corruptly persuades’ [is] ambiguous. . . . [T]he phrase cannot mean simply ‘persuades with the intent to hinder communication to law enforcement.’”<sup>10</sup> Applying these rules to the OIC’s investigation, pre-existing evidence of Lewinsky’s state of mind in allegedly attempting to dissuade Tripp from testifying truthfully in a private civil action in which Lewinsky was not a party (*i.e.*, the Paula Jones case) might have fallen short of proving “corruptly.” Thus, the importance of Tripp’s final effort to direct Lewinsky toward an unambiguous effort at “tampering” with Tripp, at the specific direction of the OIC, cannot be overstated. If Lewinsky had a solid entrapment defense, her need to cooperate with the OIC and thereafter present rehearsed testimony to the grand jury to incriminate President Clinton or others would have been diminished. Additionally, the OIC would have been forced to immunize, indict, or disregard her without her promise of cooperation and rehearsal and accept the consequences in any grand jury, impeachment, or trial proceedings targeting others, including Clinton.

Ordinarily, defense lawyers rely on the entrapment defense only as a last resort, because such a defense functionally requires an admission of culpability. Generally, it is difficult to claim, “I didn’t do it, but if I did the Government entrapped me.” In a white collar case focusing on the defendant’s *mens rea*, however, it is more reasonable to argue that, “I don’t deny what I did, or what I said, but my motive was innocent. If I sound corrupt in this particular tape recording, the prosecutor intentionally created that effect through his agent.” The use of informants is not only relevant to witness tampering. The potential use of government informants to create the crimes of bribery or unlawful gratuities,<sup>11</sup> when the payment of money to a public official might initially have been intended as a lawful campaign contribution, is obvious: asking a target to relate the contribution to a specific public act or vote could suffice.<sup>12</sup>

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be proven in 18 U.S.C. § 1503. *See generally* United States v. Brenson, 104 F.3d 1267, 1280-82 (11th Cir. 1997) (discussing general requirements and focusing on the “corruptly” element).

9. 126 F.3d 484 (3d Cir. 1997).

10. *Id.* at 487.

11. *See* 18 U.S.C. § 201(b)-(c). Bribery, in § 201(b)(1), also includes “corruptly” as an element: promising or receiving a thing of value to or by a federal official to influence or induce an official act, if done “corruptly,” constitutes bribery. The gratuities statute, at 18 U.S.C. § 201(c), requires neither proof of a corrupt motive nor a specific *quid pro quo*. In fact, as a Tenth Circuit panel held last year (although later reversed by the en banc court), 18 U.S.C. § 201(c)(2), prohibiting the offer of “anything of value” for testimony under oath, literally would have criminalized the offer of transactional immunity to Lewinsky by the OIC. *See* United States v. Singleton, 144 F.3d 1343, 1355 (10th Cir. 1998), *vacated en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 119 S. Ct. 2371 (1999).

12. Because there is no *quid pro quo* requirement for a conviction under 18 U.S.C. § 201(c), wiring a witness to obtain a statement by anyone who has given anything of value to that or another witness that relates the gift to the testimony, or

What is the current state of federal law regarding the defense of entrapment when raised by a defendant induced by a government agent to commit a crime, particularly in white collar cases focusing on spoken words? Should routine prosecutorial use of wired witnesses ostensibly to corroborate the target's state of mind in otherwise ambiguous situations, where the defendant's "crime" literally occurs during the orchestrated conversation, receive additional scrutiny? These questions have particular force because the elements of several white collar offenses, including obstruction, perjury,<sup>13</sup> fraud,<sup>14</sup> and bribery, frequently fail to distinguish clearly between criminal and legitimate conduct.

The task of this Article is to assess the competing approaches that circuit courts have taken in defining the predisposition element in entrapment cases. It then attempts to try to reconcile them, not only with *Jacobson v. United States*,<sup>15</sup> but also with policy concerns underlying the rest of the Supreme Court's entrapment jurisprudence, particularly in light of the increased politicization of federal criminal law through investigations of public officials' conduct by independent counsel. This Article will first frame the central issue, the supplementary mens rea requirement arising in entrapment cases. Part II then will review the common law development of the federal entrapment defense, in the context of an independent counsel investigation of public officials for mens rea crimes, with particular emphasis on the Supreme Court's 1992 decision in *Jacobson v. United States*. Part III will detail the two essentially divergent views that circuit courts have taken over the meaning of the term "predisposition" in the wake of the Court's decision in *Jacobson*, including the 1994 opinion by Chief Judge Posner of the Seventh Circuit in *United States v. Hollingsworth*.<sup>16</sup> The Article will explain that *Hollingsworth's* interpretation of *Jacobson* that when, "but for" the Government's inducement, the defendant objectively would not have committed the offense in question, is incomplete. Part IV will attempt to reconcile the competing approaches with the Court's previous entrapment decisions in an attempt to ascertain which approach is most consistent with its prior entrapment jurisprudence and which best helps attain the contemporary goal of reducing the "political" component of criminal judicial enforcement. The Article concludes that a more appropriate focus for judicial or jury application of the dispositive "predisposition" test for entrapment is

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vote, even after the fact, could become a more common way to "police" campaign contributions.

13. See 18 U.S.C. § 1621. This statute prohibits "willfully" making a "material" false statement under oath. *Id.*

14. See 18 U.S.C. §§ 1341, 1343, 1346.

15. 503 U.S. 540 (1992).

16. 7 F.3d 1196 (7th Cir. 1994).

on the objectively historical evidence of the defendant's prior similar acts (justifying the Government's initial decision to target the defendant) and his or her initial responses to government inducement (justifying any continued targeting).<sup>17</sup>

#### I. FRAMING THE ENTRAPMENT ISSUE AS A SUPPLEMENTARY MENS REA REQUIREMENT

In 1932, the Supreme Court in *Sorrells v. United States*<sup>18</sup> recognized for the first time the federal defense of entrapment. Relying on the "presumed" intent of Congress, the Court held that law enforcement methods used to incite crimes might entitle some criminal defendants to an acquittal.<sup>19</sup> At the time, the Court's decision to recognize the entrapment defense was rather uncontroversial. In fact, only one member of the Court agreed with the conclusion of the circuit court that no such defense existed.<sup>20</sup> However, the remaining members of the Court did not agree about the proper source from which the entrapment defense should flow.<sup>21</sup> Consequently, the Court struggled to define the parameters of this new defense.

For years, the debate primarily focused on whether the entrapment defense should be an objective or subjective inquiry. The proponents of the "objective" view claimed that the entire focus should be on the Government's conduct in a case where an entrapment defense is asserted.<sup>22</sup> Under this view, a court's task would be to assess the law enforcement techniques at issue to determine whether they violate

17. Under the tests proposed in this Article, therefore, based upon the "talking points" prepared by Lewinsky, and Lewinsky's apparently unhesitating response to Linda Tripp, any hypothetical entrapment defense offered by Lewinsky likely would have failed. *See, e.g., United States v. Blassingame*, 197 F.3d 271, 279 (7th Cir. 1999) (affirming rejection of entrapment defense in bribery case).

18. 287 U.S. 435 (1932).

19. *See id.* at 448. The government's conduct will not *automatically* entitle a defendant to an acquittal because of the Court's further requirement that a defendant lack predisposition in order to successfully assert the entrapment defense. *See infra* note 28.

20. *See Sorrells*, 287 U.S. at 453 (McReynolds, J., dissenting without opinion). Justice McReynolds believed that the decision of the circuit court, finding no entrapment as a matter of law, should be affirmed. *See id.* To be precise, the circuit court in *Sorrells* did believe that some sort of entrapment defense was available. But under its view, the entrapment "defense" applied in situations where the defendant actually lacked the requisite intent to commit the underlying offense. *See id.* at 442. Thus, the "defense" of entrapment envisioned by the circuit court was not really a defense at all but instead was an attempt by a defendant to prove that the *prima facie* elements of the crime were not present.

21. *See id.* at 457 (Roberts, J., concurring). Instead of relying on the intent of Congress, Justice Roberts argued that the entrapment defense rested upon a "fundamental rule of public policy" that allowed courts to protect the "purity of its own temple." *See id.*

22. *See id.* at 459 (Roberts, J., concurring) ("The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents.").

some sort of acceptable standard.<sup>23</sup> In contrast, the proponents of the "subjective" view believed that the Government's conduct is only a threshold concern. Government conduct must, of course, be evaluated, but even if the Government's conduct is sufficiently egregious, the inquiry does not end.<sup>24</sup> Instead, at that point, the Government must be given an opportunity to show that the criminal defendant was "predisposed" to commit the crimes charged.<sup>25</sup> If so, the entrapment defense will fail.<sup>26</sup> Thus, by focusing on the state of mind of the individual defendant who asserts the entrapment defense, a court is said to be engaging in a subjective inquiry. In other words, when the Government induces a crime, it must be prepared to prove not only that the target had the requisite mens rea at the time he committed the crime but also that he possessed that mens rea before any government inducement.

As a practical matter, those advocating the "subjective" view of entrapment have prevailed, but their position requires further clarification.<sup>27</sup> The Court has definitively held that a defendant must

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23. See *United States v. Sherman*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring) ("The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.").

24. See generally *United States v. Russell*, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting) (recognizing that under the subjective view of the entrapment defense, a predisposed defendant cannot prevail "regardless of the nature and extent of the Government's participation."). Although the egregiousness of the Government's conduct will never alone be dispositive in an entrapment case, the Court in *Russell* did recognize that some forms of law enforcement activity might violate a defendant's due process rights. See *id.* at 431-32. When this is the case, instead of asserting an entrapment defense, the defendant must assert an "outrageous conduct" defense. See *United States v. Dyman*, 739 F.2d 762, 768 (2d Cir. 1984). The parameters of the "outrageous conduct" defense are beyond the scope of this Article. For discussions of the defense, see generally Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 Am. Crim. L. Rev. 457 (1990) (supporting the growing use of due process principles in entrapment cases).

25. See *Sorrells*, 287 U.S. at 451; see also *Russell*, 411 U.S. at 433-36 (recognizing the concerns voiced by proponents of the objective view but declining to eliminate the predisposition requirement out of respect for stare decisis as well as the concerns voiced by the Court in *Sherman*); *Sherman*, 356 U.S. at 377 n.7 (repeating the concerns voiced by Judge Learned Hand that if no reply were made to the fact of the government's inducement, "it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret").

26. See *Russell*, 411 U.S. at 436 (finding that the defendant's concession that a reasonable jury could have found him predisposed was "fatal to his claim of entrapment").

27. See Paul Marcus, *Presenting, Back from the [Almost] Dead, The Entrapment Defense*, 47 Fla. L. Rev. 205, 214 (1995) [hereinafter, Marcus, *Back from the [Almost] Dead*] ("Debate concerning the two tests is over at the Supreme Court level."). The respective merits of these two views have been fully debated and need not be further explored in this Article. As an intellectual matter, academics can continue the debate over the propriety of having a predisposition inquiry. See generally Paul Marcus, *The Entrapment Defense* (1989) (presenting a comprehensive evaluation of the entrapment defense).

lack predisposition in order to successfully assert an entrapment defense.<sup>28</sup> Now, the only real source of debate concerns the content of this predisposition inquiry: how do prosecutors prove and juries determine and distinguish the two-step temporal mens rea element?

Since the *Sorrells* decision in 1932, the Court has handed down several opinions that directly address the entrapment defense in federal court.<sup>29</sup> Unfortunately, the decisions by the Court have often prompted more questions than answers. *Jacobson v. United States*,<sup>30</sup> the Court's most recent pronouncement concerning the entrapment defense, is no exception. Although *Jacobson* was initially thought to address only the "timing" of the predisposition analysis,<sup>31</sup> circuit courts now have split over whether the Court instead redefined predisposition to include an additional objective component.<sup>32</sup> For clarity's sake, it should be emphasized that *no* circuit court believes that the Court has adopted a purely "objective" approach to entrapment. Again, that debate is over, and the proponents of the subjective view have won, even if this subjective view remains difficult to apply.<sup>33</sup> Hence, every entrapment defense necessitates a *subjective* inquiry that focuses on the predisposition of the individual defendant.

Accepting that premise, however, begs the further question as to what this term "predisposition" means: does "predisposition," itself, contain an objective element to help distinguish that inquiry from the original mens rea component of the offense? Whatever agreement that may have existed regarding the meaning of predisposition has

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28. See *Russell*, 411 U.S. at 423; see also *Mathews v. United States*, 485 U.S. 58, 63 (1988) ("A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct"). In *Mathews*, any lingering doubts about the Court's insistence on maintaining a subjective approach to the entrapment defense were put to rest. Not only did the majority reaffirm the Court's preference for the subjective approach, see *id.* at 63, but Justice Brennan, long an advocate of the objective approach, also recognized that as a matter of stare decisis, the debate was over and the proponents of the subjective view had won. See *id.* at 66-67 (Brennan, J., concurring).

29. See *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992); *Mathews*, 485 U.S. at 63; *Hampton v. United States*, 425 U.S. 484, 488 (1976); *Russell*, 411 U.S. at 435-36; *Sherman*, 356 U.S. at 372.

30. 503 U.S. 540 (1992).

31. See Brian T. Feeney, Note, *Scrutiny for the Serpent: The Court Refines Entrapment Law in Jacobson v. United States*, 42 Cath. U. L. Rev. 1027, 1028 (1993) (describing the holding of *Jacobson* and its purported impact on the law of entrapment).

32. See *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) (recognizing that the court's interpretation of predisposition conflicted with that of the Seventh Circuit in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc)); see also *United States v. Knox*, 112 F.3d 802, 808 (5th Cir. 1997) (adopting the definition of predisposition advocated by the Seventh Circuit in *Hollingsworth* and recognizing the contrary view taken by both the First Circuit in *United States v. Gendron*, 18 F.3d 955 (1st Cir. 1994), and the Ninth Circuit in *Thickstun*).

33. See *supra* notes 26-28 and accompanying text.

now been clouded by the Court's decision in *Jacobson*.<sup>34</sup>

Although allegedly based on the "presumed" intent of Congress, the entrapment defense, as noted above, is a judicially-created doctrine.<sup>35</sup> Therefore, analyzing legislative history or statutory text will be of no use in trying to ascertain the precise scope of this defense. The legal universe of the entrapment defense in federal courts consists primarily of six decisions handed down by the Court from 1932 to 1992. Understanding this universe will therefore be critical before any real assessment of the competing circuit court views can occur.

## II. THE LEGAL BACKGROUND: THE SUPREME COURT'S ENTRAPMENT JURISPRUDENCE

Because the entrapment defense is essentially a court-created doctrine, understanding the contours of the defense requires an in-depth understanding of the relevant case law. As noted earlier, the Supreme Court has handed down several opinions explicitly dealing with the entrapment defense. Only four of these opinions, however, give any real idea about how to define predisposition. The other cases either involve debates over the form of the entrapment defense, i.e. whether predisposition should even be considered,<sup>36</sup> or involve some other procedural issue collateral to the merits of the entrapment defense.<sup>37</sup> Thus, the focus of this part will be on the four cases that

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34. See *supra* note 30.

35. See, e.g., Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011, 1037 (1987) (describing the congressional intent rationale as "obviously fictional"); Louis M. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111, 129-30 (stating that "it is painfully obvious that the statutory basis for the defense is wholly fictional"); John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 Geo. L.J. 1945, 1953 (1996) (describing the statutory intent rationale of the majority in *Sorrells* as a baseless "judicial contrivance" because no statutory text or legislative history supported the Court's interpretation); Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 Nw. U. L. Rev. 305, 305 (1996) (describing the entrapment defense as "a creature of judicial fiat borne of necessity in consideration of the various evils that might otherwise go unchecked in its absence").

36. Cases that fall into this category include both *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 425 U.S. 484 (1976). In *Russell*, the defendant's predisposition was conceded, and the Court therefore had no formal opportunity to address the evidence in so far as it tended to establish the defendant's predisposition. See *Russell*, 411 U.S. at 436. Nonetheless, the Court in dicta did make several statements shedding light on the nature of the predisposition inquiry. See *id.* at 433-35. In *Hampton*, a divided court agreed that the traditional, subjective approach to entrapment should be applied, but the Court could not agree on the specific content of a due process defense. See *Hampton*, 425 U.S. at 492. In the end, the Court concluded that the defendant, whose crime of selling narcotics was possible only after the Government had supplied him with the drugs, could not avail himself of an entrapment defense because he was predisposed. See *id.* at 491-95.

37. See *Mathews v. United States*, 485 U.S. 58, 61 (1988). In *Mathews*, the Court

give some content to the predisposition requirement. Although the Court did not give a concrete definition of predisposition in any of these cases, the Court did have an opportunity to address several factual scenarios that arguably involved some form of entrapment by government officials. Thus, the Court had an opportunity to evaluate evidence as it related to the question of predisposition. Furthermore, by better understanding what the Court has traditionally looked for when deciding whether a defendant was predisposed, a lower court may be able to ascertain what the term “predisposition” means in the context of the entrapment defense.

A. *In the Beginning . . . Entrapment and the Predisposition Requirement—Sorrells v. United States*

The most significant aspect of the Supreme Court’s decision in *Sorrells v. United States*<sup>38</sup> was the Court’s official recognition of the entrapment defense. Additionally, because the Court did not have any Congressional language on which to rely, either explicitly or implicitly,<sup>39</sup> the decision in *Sorrells* is an important source for gleaning the content of the entrapment defense. Despite Justice Robert’s pleas to the contrary in his concurrence, the majority in *Sorrells* held that the defendant’s predisposition was relevant in ascertaining whether the defendant was entrapped.<sup>40</sup> Thus, much of what we know about the “predisposition” inquiry comes from the Court’s examination of the evidence in *Sorrells*.

In *Sorrells*, the defendant was charged with two counts of violating the National Prohibition Act.<sup>41</sup> The arresting agent, posing as a tourist, accompanied three of the defendant’s friends to the defendant’s house on July 13, 1930.<sup>42</sup> While there, the government agent, a former veteran of the First World War, learned that the defendant had been a member of the agent’s armed services division during the war.<sup>43</sup> During the visit, the agent asked to buy alcohol from the defendant at least three times.<sup>44</sup> The defendant then left his

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was faced with the question of whether a defendant could simultaneously deny committing the underlying offense while claiming to have been entrapped. *See id.* at 62. While these positions would seem to be mutually exclusive, the Court held that a defendant is entitled to plead seemingly inconsistent defenses. *See id.* (reversing the decision by the court of appeals to deny petitioner an opportunity to raise inconsistent defenses).

38. 287 U.S. 435 (1932).

39. *See id.* at 446 (recognizing that literal interpretation of the statute did not support the Court’s decision).

40. *See id.* at 444-45.

41. *See id.* at 438.

42. *See id.* at 439.

43. *See id.*

44. *See id.* at 439-40. The witnesses disagreed over the number of requests the agent made for alcohol. The agent admitted to making three requests, but the defendant’s friends testified that the agent may have made as many as five requests

house, and returned with a half-gallon of liquor that he sold to the government agent.<sup>45</sup>

After being charged with two counts of violating the National Prohibition Act, the defendant at trial pleaded not guilty, resting on an entrapment defense.<sup>46</sup> The trial court found that, as a matter of law, there was no entrapment and thus refused to submit the issue to the jury.<sup>47</sup> The defendant was then found guilty by a jury, and sentenced to eighteen months in prison.<sup>48</sup> After the district court's decision was affirmed by the court of appeals, the Supreme Court granted the defendant's writ of certiorari to decide whether there was sufficient evidence to submit the issue of entrapment to the jury.<sup>49</sup> Before the Court could answer that question, it first had to reach the conclusion that there was in fact such a defense in federal court. The Court generally agreed that such a defense existed.<sup>50</sup> The Court then had to evaluate the evidence in the case to decide whether the issue of entrapment should have been submitted to the jury. Although the Court did not categorize the evidence as such, the Court discussed the evidence as it pertained first to the Government's activities, and secondly, to the defendant's disposition to commit the alleged offense.<sup>51</sup>

At trial, both the defendant and the Government presented evidence relating to the defendant's predisposition to commit the alleged offenses. The defendant attempted to show his lack of predisposition in several ways. First, those friends present during the transaction testified that the agent made persistent requests for alcohol.<sup>52</sup> Second, those same friends testified that the agent made one of the requests immediately after telling the defendant that he too had been a member of the defendant's division during his stint in the armed services, taking advantage of the defendant's feelings of camaraderie.<sup>53</sup> Third, the defendant had several witnesses testify as to the defendant's good character.<sup>54</sup> The Government rebutted this testimony by presenting three witnesses who claimed "that the

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for alcohol. *See id.* at 436-40.

45. *See id.* at 439.

46. *See id.* at 438.

47. *See id.*

48. *See id.* at 438-39.

49. *See id.* at 439.

50. *See id.* at 443.

51. *See id.* at 441-42.

52. *See id.* at 439-40.

53. *See id.* at 440.

54. *See id.* Three of the defendant's neighbors, as well as an official of the company for whom the defendant worked, testified that the defendant was of good character. *See id.* In addition, the company officer testified to the fact that the defendant had worked "continuously without missing a pay day since March, 1924." *Id.*

defendant had the general reputation of a rum-runner.”<sup>55</sup>

The Court, however, noted that there was “no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.”<sup>56</sup> Viewing the evidence in its entirety, the Court concluded that the issue of entrapment should have been submitted to the jury and thus reversed the lower court, remanding the case for further proceedings.<sup>57</sup> Nowhere in its opinion did the Court explicitly define predisposition. Further elaboration as to the meaning of that term would have to wait for another day.

### B. *Sherman v. United States*

In *Sherman v. United States*,<sup>58</sup> the Court was again faced with a claim of entrapment. The defendant, Sherman, was charged with conducting three sales of narcotics in violation of 21 U.S.C. § 174.<sup>59</sup> As in *Sorrells*, the defendant was convicted at trial after asserting a defense of entrapment.<sup>60</sup> Unlike the defendant in *Sorrells*, the defendant in *Sherman* was able to present his case to the jury.<sup>61</sup> However, the jury rejected the claim of entrapment and found the defendant guilty.<sup>62</sup> Notwithstanding the jury’s verdict, the Court agreed to hear the case to decide whether the defendant had been entrapped as a matter of law.<sup>63</sup>

In *Sherman*, a government informant sought to induce the defendant, a recovering drug addict, to commit a crime by repeatedly asking the defendant to supply him with drugs.<sup>64</sup> When the repeated requests did not work, the informant appealed to the defendant’s

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55. *Id.* at 441.

56. *Id.*

57. *See id.* at 452. By saying that the jury should have resolved the issue of entrapment, the Court was impliedly saying that a reasonable jury could have found that the defendant lacked the predisposition to commit the alleged offense. In fact, the Court clearly stated this when describing its evaluation of the evidence:

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no *previous disposition* to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.

*Id.* at 441 (emphasis added).

58. 356 U.S. 369 (1958).

59. *See id.* at 370.

60. *See id.* at 370-71.

61. *See id.* at 372.

62. *See id.*

63. *See id.* at 370 (“The issue before us is whether petitioner’s conviction should be set aside on the ground that as a matter of law the defense of entrapment was established.”).

64. *See id.* at 373.

sympathy for a fellow addict to persuade the defendant to commit the alleged drug offense.<sup>65</sup> The defendant finally agreed to assist the informant, supplying him with narcotics on three occasions in November of 1951.<sup>66</sup> Given the evidence of the Government's conduct, the Court said that it was "patently clear that [the defendant] was induced by [the government informant]."<sup>67</sup> However, like the majority in *Sorrells*, the Court in *Sherman* recognized that the entrapment inquiry did not end with a finding of inducement. The Court also had to assess whether the defendant was predisposed to commit the crimes for which he was charged.<sup>68</sup>

The Government argued that, notwithstanding the conduct of its agents, the defendant's predisposition to commit the crimes rendered the defense of entrapment unavailable.<sup>69</sup> The Government believed that the defendant was predisposed because he "evinced a 'ready complaisance' to accede to [the informant]'s request."<sup>70</sup> The Court, however, rejected this argument, saying that the evidence simply did not support a finding of predisposition.<sup>71</sup>

The Court gave some indication as to what type of evidence *would* have sufficed to support the jury's finding of predisposition. First, the Court noted that the evidence did not show that the defendant himself was actually in the trade of selling illegal narcotics.<sup>72</sup> Second, the Court observed that when the defendant's home was searched, no illegal narcotics were found.<sup>73</sup> Moreover, the Court also recognized that the evidence failed to establish any pecuniary motive for the defendant's offenses.<sup>74</sup> Finally, the Court suggested that, at a minimum, a defendant's lack of reluctance could also be evidence of the defendant's predisposition or lack thereof.<sup>75</sup>

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65. *See id.*

66. *See id.* at 371.

67. *Id.* at 373.

68. *See id.* at 376-77 (rejecting the idea that the Court should reformulate the entrapment defense so as to do away with the predisposition inquiry).

69. The Court had no trouble concluding that the government informant was a government agent for purposes of the entrapment defense. The Court noted that the informant was "an active government informer," and that the government could not therefore "make such use of an informer and then claim disassociation through ignorance." *Id.* at 373-75.

70. *Id.* at 375.

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. The Court never expressly said that a defendant's lack of reluctance to engage in the criminal endeavor could be affirmative evidence of that defendant's predisposition. However, the Court did say that the defendant's reluctance to commit the crime in *Sherman* indicated that he *lacked* the predisposition to commit the crimes for which he was charged in that case. *See id.* at 375 (recognizing that the defendant's hesitancy to commit the crimes was evidence that he lacked predisposition and that the Government must rebut this evidence with its own). If a defendant's reluctance can be evidence that he lacks predisposition, one might logically conclude that the

The evidence the Government *did* produce was also deemed insufficient in the Court's eyes to sustain a finding of predisposition. To support the jury's finding, the Government relied primarily on the defendant's two previous narcotics convictions. In 1942, the defendant had been convicted of selling narcotics, and in 1946, he had been convicted of possessing narcotics.<sup>76</sup> The Court, however, recognized that the issue was not whether the defendant was ready to commit the crimes in 1942, or even in 1946. Rather, the issue was whether the defendant was ready to commit the crimes when the informant approached him. The Court found that the nine-year-old sales conviction and the five-year-old possession conviction could not support a finding that the defendant was ready to commit the crimes in 1951.<sup>77</sup> Furthermore, the Government failed to present any other evidence relevant to the predisposition inquiry. As a result, the Court found that the defendant had been entrapped as a matter of law.<sup>78</sup> Once again, the Court never explicitly defined the term "predisposition," though the Court's analysis adds to the insight provided in *Sorrells* as to how the Court may have viewed the term.

### C. United States v. Russell

In *United States v. Russell*,<sup>79</sup> the Court was not faced with a situation in which the Justices had to evaluate evidence of predisposition. The defendant in *Russell* conceded that a reasonable jury might have found him predisposed to commit the crimes for which the defendant was charged.<sup>80</sup> Thus, the Court had no formal opportunity to address the contours of the predisposition requirement. Instead, the Court was asked yet again to abandon the predisposition requirement and adopt an approach to entrapment that focused exclusively on the Government's allegedly outrageous conduct.<sup>81</sup>

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converse proposition is also true. In other words, if the defendant displays no reluctance, a fact-finder might conclude that the defendant is predisposed. In fact, subsequent cases have recognized that a defendant's "eagerness" to commit a crime can be evidence of that defendant's predisposition to engage in the charged crime. See *Jacobson v. United States*, 503 U.S. 540, 553 (1992) (recognizing that a defendant's eagerness is probative evidence of his predisposition but that such evidence has little probative value when the eagerness is in response to an extreme government inducement).

76. See *Sherman*, 356 U.S. at 375.

77. See *id.* at 375-76 ("[A] nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time [the informant] approached him . . .").

78. See *id.* at 377-78.

79. 411 U.S. 423 (1973).

80. See *id.* at 427. Because the Court refused to extend the entrapment defense to predisposed defendants, this concession ultimately doomed the defendant's appeal. See *id.* at 436.

81. See *id.* at 432-33 ("Respondent also urges . . . that we broaden the nonconstitutional defense of entrapment in order to sustain the judgment of the Court of Appeals.").

The Court rejected this request.<sup>82</sup> In doing so, however, the Court may have explained inadvertently what the Court means when it refers to a defendant's "predisposition." In upholding the subjective view of the entrapment defense, the Court detailed the history behind the entrapment defense in federal courts. It noted that the Court in *Sorrells* first recognized the defense, but that it gave protection only to those "otherwise innocent" persons in whom the Government had implanted the disposition to commit the alleged offense.<sup>83</sup> By allowing only these defendants to assert an entrapment defense, the Court in *Russell* recognized that "the thrust of the entrapment defense was held to focus on the *intent* or predisposition of the defendant to commit the crime."<sup>84</sup> Thus, although the Court in *Russell* had no occasion to decide whether the defendant was predisposed, the Court did seem to equate "predisposition" with "intent."<sup>85</sup>

#### D. *Jacobson v. United States*

*Jacobson v. United States*,<sup>86</sup> the Court's most recent decision concerning the entrapment defense, has created confusion among circuit courts as to what the term "predisposition" means. The defendant, Jacobson, was indicted under 18 U.S.C. § 2252(a)(2)(A) for knowingly receiving child pornography through the mail.<sup>87</sup> Despite his plea of entrapment, the jury found him guilty, and the court of appeals affirmed his conviction, saying that the Government had proven beyond a reasonable doubt that he was predisposed and was thus not entitled to a defense of entrapment.<sup>88</sup>

The Supreme Court granted the defendant's writ of certiorari to decide whether the defendant had been entrapped as a matter of law.<sup>89</sup> Because the Government conceded that the defendant was induced to commit the crime, the Court recognized that the issue was whether the defendant was predisposed to commit the acts in question.<sup>90</sup> The Court, however, made it clear from the very outset that the defendant's predisposition had to be independent of the Government's activities.<sup>91</sup> Accordingly, the Court focused on

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82. *See id.* at 433-36.

83. *See id.* at 428-29.

84. *Id.* at 429 (emphasis added).

85. In fact, even Judge Posner's opinion in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc), recognized that the Court in *Russell* had equated predisposition to intent, a mens rea term. *See id.* at 1198. The Court's traditional view of predisposition, however, had very little impact on Judge Posner's interpretation of the predisposition requirement. *See infra* notes 127-64 and accompanying text.

86. 503 U.S. 540 (1992).

87. *See id.* at 542.

88. *See id.*

89. *See id.* at 547-48.

90. *See id.* at 542.

91. *See id.* at 553 ("Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's

“whether the Government carried its burden of proving that [the defendant] was predisposed to violate the law *before* the Government intervened.”<sup>92</sup> Several members of the Court did not agree with the majority’s conclusion that predisposition should be measured at this juncture. Instead, Justice O’Connor, in a dissenting opinion joined by three other Justices, argued that predisposition should be measured at the time the Government actually solicits the defendant to commit the alleged offense.<sup>93</sup> Unpersuaded, the majority evaluated the evidence by deciding whether a reasonable jury could have found the defendant predisposed before the Government first contacted the defendant.

The Government first made contact with the defendant after the Government obtained his name from a mailing list of those who had legally received magazines containing nude pictures of preteen and teenage boys.<sup>94</sup> Within three months of the defendant’s purchase of these materials, Congress enacted a statute making the receipt of such materials through the mail illegal.<sup>95</sup> After the new law was enacted, postal inspectors discovered the defendant’s name on a mailing list of those who had previously purchased magazines containing sexually explicit nude photographs of children.<sup>96</sup> After obtaining defendant’s name from this list, “[t]here followed over the next 2½ years repeated efforts by two government agencies, through five fictitious organizations and a bogus pen pal, to explore [the defendant’s] willingness to break the new law by ordering sexually explicit photographs of children through the mail.”<sup>97</sup>

During this period of time, the Government used various tactics to test the defendant’s willingness to break the law. They started by sending Jacobson brochures and other materials from fictitious groups that claimed to be fighting censorship.<sup>98</sup> Other mailings from these groups had asked the defendant provocative questions about his

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investigation and that it existed independent of the Government’s many and varied approaches to petitioner.”).

92. *Id.* at 549 n.2. In her dissent, Justice O’Connor argued that the majority’s approach to the timing of the predisposition inquiry diverged from the Court’s prior decisions. *See id.* at 556-59. The majority rejected this argument, saying that its holding with regard to the timing of the predisposition analysis was not “an innovation in entrapment law.” *Id.* at 549 n.2. For an excellent discussion on this point, see Scott C. Paton, Note, “*The Government Made Me Do It*”: A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 Cornell L. Rev. 995, 1023-26 (1994) (arguing that the majority’s approach was the one most consistent with prior case law).

93. *See Jacobson*, 503 U.S. at 556-57 (O’Connor, J., dissenting).

94. As the Court noted, the defendant’s receipt of these magazines was legal under both state and federal law. Within three months of the defendant’s purchase, Congress changed the law, making the receipt of such sexually explicit pictures illegal under federal law. *See id.* at 543.

95. *See id.*

96. *See id.*

97. *Id.*

98. *See id.* at 543-44.

sexual interests as part of a “survey.”<sup>99</sup> At one point, the Government even created a fictitious pen pal who wrote to the defendant to discuss sexual interests that the two purportedly had in common.<sup>100</sup> In March of 1987, twenty-six months after the postal service mailing campaign had begun, the defendant attempted to purchase child pornography from a fictitious government organization that had mailed him a brochure.<sup>101</sup> Although the order was never filled, the defendant was given another opportunity later that spring. Again, he attempted to make a purchase.<sup>102</sup> When the materials were then delivered to his home, the defendant was arrested for violating the federal statute in question.<sup>103</sup>

The Court recognized that when the defendant made his first order, in March of 1987, he had become predisposed to committing the crime in question.<sup>104</sup> The issue, however, was whether he was predisposed *before* the postal service had commenced its mailing campaign nearly two-and-a-half years prior to that point.<sup>105</sup> To answer that question, the Court divided the Government’s evidence into two categories: (1) evidence developed before the Government’s contact with the defendant and (2) evidence gathered during the course of the Government’s investigation.<sup>106</sup>

Because the Court ruled that predisposition must be measured prior to the time the Government approaches the defendant, the Government’s most important evidence was its pre-investigation evidence.<sup>107</sup> The only piece of pre-investigation evidence that the Government proffered was the defendant’s *legal* purchase of

99. *See id.* at 544.

100. *See id.* at 545.

101. *See id.* at 546, 552.

102. *See id.* at 547, 552.

103. *See id.* at 547. Jacobson was indicted under 18 U.S.C. § 2252(a)(2)(A) (1994), which prohibits knowingly receiving through the mails a “visual depiction [that] involves the use of a minor engaging in sexually explicit conduct . . .” *Id.*

104. *See Jacobson*, 503 U.S. at 550.

105. As the majority stated:

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

*Id.* at 548-49 (emphasis added). *See supra* notes 89-90 and accompanying text.

106. *See Jacobson*, 503 U.S. at 550.

107. The Court did not find post-investigation evidence to be irrelevant, but it did note that evidence of predisposition gathered after the Government’s initial contacts with a defendant may be suspect, because any predisposition such evidence might show could have resulted from the Government’s inducement efforts. *See id.* at 553. Therefore, where the Government has engaged in an extensive campaign to induce a defendant to commit a crime, the only practical way for the Government to show that a defendant was predisposed is for the Government to present evidence that shows the defendant’s disposition to commit the alleged crime prior to contact with the Government.

magazines that contained nude pictures of children.<sup>108</sup> According to the majority's view, this evidence simply was not of sufficient probative value to indicate the defendant's predisposition *to break the law* in order to obtain child pornography.<sup>109</sup> The defendant's decision to order the magazine may have demonstrated his "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 predisposition."<sup>110</sup>

The majority then turned to the post-investigation evidence offered by the Government. The Government's key piece of evidence from this category was the defendant's eager response to the government-sponsored solicitation.<sup>111</sup> Ordinarily, the Court noted, this would suffice to indicate the defendant's predisposition.<sup>112</sup> Again, the Court indicated that, as of May 1987, the defendant *was* predisposed to purchase such material.<sup>113</sup> The problem, said the Court, was that the Government could not prove that the defendant's predisposition was *independent* of the Government's many and varied approaches to

108. *See id.* at 550-51.

109. *See id.* at 550 ("[T]his is scant if any proof of petitioner's predisposition to commit an illegal act, the criminal character of which a defendant is presumed to know."). The majority's analysis of this evidence created another point of contention between it and the dissent. The dissent argued that the majority's position amounted to a requirement of specific intent to break the law. *See id.* at 559-60 (O'Connor, J., dissenting). The majority rejected this notion, arguing instead that proof that the defendant "engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing." *Id.* at 551 n.3.

110. *Id.* at 550.

111. The defendant's "eager response" to the solicitation was not the only piece of post-investigation evidence offered by the Government. The Government also attempted to show the defendant's predisposition by introducing surveys the defendant had submitted to the government-sponsored fictitious organizations. *See id.* The defendant's responses to the surveys indicated an interest in pre-teen pornography. *See id.* Like the defendant's legal purchase of the pornographic magazines, this evidence was dismissed by the Court as having little or no probative value. *See id.* Although both pieces of evidence indicated the defendant's interest in child pornography, neither piece of evidence demonstrated the defendant's willingness to break the law in order to obtain such material. *See id.* at 551.

112. As the majority noted:

Had the agents in this case simply offered [the defendant] the opportunity to order child pornography through the mails, and [defendant]—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.

*Id.* at 550. The problem in *Jacobson*, however, was that "[t]he evidence that [the defendant] was ready and willing to commit the offense came only after the Government had devoted 2½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." *Id.* at 553.

113. *See id.* at 550.

him.<sup>114</sup> Thus, whatever probative value the defendant's eager response might have had two-and-a-half years earlier, it had little or no probative value in March of 1987, in light of the Government's extensive mailing campaign.<sup>115</sup> Because neither the pre-investigation evidence nor the post-investigation evidence adequately established the defendant's predisposition to commit the alleged offenses, the Court held that the defendant was entrapped as a matter of law.<sup>116</sup> In a passage that would later be critical to the present debate among the circuits regarding the meaning of predisposition, the Court summarized the case as follows: "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."<sup>117</sup>

Such was the state of entrapment law in 1992. Several Court opinions had addressed, in some fashion, the predisposition requirement. Though the Court never explicitly defined the concept, it had no trouble evaluating evidence of predisposition in its entrapment cases. Unfortunately, none of those cases involved a purely "white collar" offense, with the defendant's spoken word as evidence of the required mens rea. In the wake of *Jacobson*, a litigant reasonably might have believed that he or she could parse these decisions and come up with a definition of predisposition that would be generally accepted. Reasonable or not, this belief was shattered two years later when the Seventh Circuit decided *United States v. Hollingsworth*.<sup>118</sup>

### III. DISAGREEMENT OVER THE PROPER MEANING OF "PREDISPOSITION"

In the wake of the Court's decision in *Jacobson*, the circuit courts have split as to how to properly define the term predisposition. The Seventh Circuit now defines a predisposed person as someone who, if left to his own devices, likely would have committed the charged crime.<sup>119</sup> The focus of this approach is not only on the defendant's mental state, but also includes his objective circumstances.<sup>120</sup> To put it differently, "but for" the Government's actions, would the crime have

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114. *See id.* at 553.

115. "[Defendant's] ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails." *Id.* at 553.

116. *See id.* at 542.

117. *Id.* at 553-54.

118. 27 F.3d 1196 (7th Cir. 1994); *see also infra* notes 118-64 and accompanying text (analyzing the *Hollingsworth* opinion).

119. *See Hollingsworth*, 27 F.3d at 1200.

120. *See id.*

been committed?<sup>121</sup> In contrast, the First Circuit has held that a predisposed defendant is someone who would be willing to commit a crime if given an ordinary opportunity.<sup>122</sup> Whether such an opportunity would likely have been given to the defendant had the Government not intervened is irrelevant. Although there are semantic differences in the standards used by other circuits, these two approaches are, for most purposes, the basic alternatives from which the courts must choose in the future.<sup>123</sup> The next question is which approach should be adopted.

At some point, absent Congressional intervention,<sup>124</sup> the courts will have to resolve the debate over the meaning of predisposition. This need has become especially serious in light of the increased politicization of so-called “verbal” crimes. Assuming that prosecutors and investigators continue the “traditional” practice of using informants to induce such “verbal” crimes by targeted public officials, this resolution needs to arise sooner rather than later and therefore should be confronted first by the courts.

Which approach should lower courts adopt? This question can be approached from two perspectives. First, one can ask narrowly which approach represents the most honest interpretation of the *Jacobson* decision. After all, if *Jacobson* can be read to clearly support one view or another, that view should control lower courts absent some compelling policy reason to the contrary. Although stare decisis is admittedly a less than glamorous way to resolve a legal issue, our system of justice generally requires that future courts adhere to the principles set forth in prior decisions, at least until Congress addresses the issue.

The problem, however, is that *Jacobson* contains some ambiguous language that arguably supports lower courts on both sides of the debate. One might argue that because *Jacobson* is ambiguous, courts are free to resolve the issue either as a matter of policy or upon the equities of a particular case, including the rule of lenity in criminal cases. The problem with this approach, though, is that the “policies” supporting the entrapment defense have been created entirely by the Supreme Court.<sup>125</sup> One cannot, therefore, extract policies from the Court’s prior decisions without also looking at the treatment the

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121. See Marcus, *Back from the [Almost] Dead*, *supra* note 27, at 234.

122. See *United States v. Gendron*, 18 F.3d 955, 962 (1st Cir. 1994).

123. For instance, the Eleventh Circuit endorsed the definition of predisposition given by the First Circuit in *Gendron* though phrasing it slightly differently. As that court stated, a defendant is predisposed if he is “read[y] and willing[] to engage in the charged crime absent any contact with the government’s officers or agents.” *United States v. Brown*, 43 F.3d 618, 624 (11th Cir. 1995).

124. See *infra* note 217 (recognizing Congress’s ability to change the entrapment defense because it is not of Constitutional dimension).

125. See *supra* Part I.

Court has traditionally given to the predisposition question.<sup>126</sup> Thus, if *Jacobson* alone cannot resolve the debate, past decisions must be analyzed in the aggregate in order to decide which broader social policy is most consistent with the Court's entrapment jurisprudence. No matter how one approaches the question, the resolution ultimately may be the same: the Court itself, both in *Jacobson* and its earlier decisions, unfortunately has never shown much concern for a defendant's objective circumstances. It has instead looked at predisposition as a mens rea issue that inquires into a defendant's willingness to engage in criminal activity irrespective of the Government's inducement—a measure of a particularly ambiguous kind, since in all entrapment cases, as a preliminary matter, we begin with the assumption that the defendant did, in fact, possess the requisite mens rea to commit the crime in question, yet, was at the same time induced by the Government.

Prior to *Jacobson*, the circuit courts uniformly agreed that the predisposition issue was a mens rea issue that measured the defendant's theoretical willingness to commit the charged offense without inducement by the Government.<sup>127</sup> In 1994, however, the Seventh Circuit, in an opinion by Judge Posner, interpreted the

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126. In order to precisely understand the contours of the policy being used to support a legal position, an advocate should always understand the legal context from which the policy arises. If taken at a very high level of abstraction, a policy expressed in a statute could support any number of legal positions. For instance, if Congress ever chose to enter into the entrapment debate, it could pass a statute defining the contours of such a defense. See *United States v. Russell*, 411 U.S. 423, 433 (1973). Hypothetically, Congress could enact this entrapment statute in order to prevent abuses by law enforcement officials. Congress might even choose to enact a two-part statutory scheme similar to the framework today recognized by the Court. The first prong of the defense would address the government's law enforcement techniques—the inducement. With respect to the second prong, Congress, as did the Court in *Sorrells v. United States*, 287 U.S. 435 (1932), might choose expressly to extend this defense only to non-predisposed defendants. See *id.* at 451. A defendant asserting an entrapment defense under this statute might argue that the government's conduct should be dispositive. In other words, the policy of the statute is to prevent abuses by law enforcement officials. Allowing a defense of entrapment any time the government has acted badly would further this statutory purpose. This statutory purpose, if taken at a high-level of abstraction, arguably supports such a position. Yet, no one would argue that a hypothetical statute should be so interpreted if Congressional intent is truly the deciding factor in light of the two-part statutory framework. In deciding how to define predisposition, a court should be equally wary of extracting principles from prior decisions by the Court and using them to support a specific interpretation of predisposition. Principles announced in the Court's prior decisions must be considered in light of the context in which they were given. Otherwise, such principles, as in the example above, may be used to support a position that is entirely inconsistent with the meaning for which they were intended.

127. See generally *United States v. Cecil*, 96 F.3d 1344, 1348 (10th Cir. 1996) (explaining that the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the crime before Government involvement); *United States v. Barger*, 931 F.2d 359, 366 (6th Cir. 1991) (same); *United States v. Ulloa*, 882 F.2d 41, 44 (2d Cir. 1989) (same); *United States v. Gambino*, 788 F.2d 938, 943 (3d Cir. 1986) (same).

Court's decision in *Jacobson* as a departure from this view of predisposition. According to Judge Posner, the Court in *Jacobson* "clarified" the meaning of predisposition by requiring an examination into the defendant's objective circumstances.<sup>128</sup> Thus, for a defendant to be predisposed, he must not only be willing to commit the charged crime, his objective circumstances must also be such that he would have likely committed the crime even if the Government had not intervened.<sup>129</sup>

Judge Posner asserted several premises for this reading of the *Jacobson* decision. As an initial premise supporting his position, Judge Posner argued that *Jacobson*, despite its language to the contrary, was a decision that "changed the landscape of the entrapment defense."<sup>130</sup> Judge Posner then cited several circuit court cases to support this proposition.<sup>131</sup> The problem, however, is that none of these circuits support Judge Posner's position in *United States v. Hollingsworth*.<sup>132</sup> Furthermore, the Court in *Jacobson* expressly disavowed the notion that its holding represented a departure from the Court's traditional approach to entrapment law.<sup>133</sup> Not to be dissuaded by the Court's denial, however, Judge Posner argued that "it is not unusual for a court to change the law without emphasizing its

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128. See *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994).

129. See *id.*

130. *Id.* at 1198.

131. See *id.* Judge Posner, in arguing that *Jacobson* worked a change in the meaning of predisposition, argued that "[c]ases both in this and in other circuits, besides the panel decision in this case, recognize that *Jacobson* has changed the landscape of the entrapment defense." *Id.* For a discussion of these cases and their holdings, see *supra* note 127 and accompanying text.

132. For instance, the Seventh Circuit stated that its decision to reverse the lower court's denial of a motion to withdraw a guilty plea was "strongly buttressed by the fact that [the defendant's] plea came six months before the Supreme Court decision breathing new life into the entrapment defense." *United States v. Groll*, 992 F.2d 755, 760 (7th Cir. 1993). The Seventh Circuit never referred to any substantive changes in the defense brought about by *Jacobson*. See *id.* In *United States v. Olson*, 978 F.2d 1472, 1483 (7th Cir. 1992), the Seventh Circuit did refer to the "new standard" enunciated in *Jacobson*. But as that court made clear, the standard to which it was referring involved the time at which predisposition must be measured. See *id.* ("[T]he prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.") (quoting *Jacobson v. United States*, 503 U.S. 540, 549 (1992)). Additionally, the Ninth Circuit in *United States v. Mkhsian*, 5 F.3d 1306, 1310-11 (9th Cir. 1993), also discussed *Jacobson* as it related to the timing of the predisposition inquiry. The Ninth Circuit case of *United States v. Skarie*, 971 F.2d 317, 321 (9th Cir. 1992), was also cited by the *Hollingsworth* court to support its position. See *Hollingsworth*, 27 F.3d at 1198. Yet, the Ninth Circuit has explicitly rejected the analysis used by the Seventh Circuit in *Hollingsworth*. See *United States v. Thickstun*, 110 F.3d 1394, 1397 (9th Cir. 1997). As one article suggests, one could plausibly argue that *Jacobson* did not alter the entrapment defense even in the manner suggested above, regarding the timing of predisposition. See Paton, note 92, at 1023-26. Irrespective of that point, however, none of the decisions cited in *Hollingsworth* support the notion that *Jacobson* worked a wholesale change in the meaning of predisposition.

133. See *Jacobson*, 503 U.S. at 549 n.2.

departures from or reinterpretation of precedent; emphasis on continuity is characteristic of common law lawmaking even when innovative, and the doctrine of entrapment is a common law doctrine."<sup>134</sup>

After setting the stage by arguing that *Jacobson* had changed entrapment law, Judge Posner then moved on to the substance of his argument: that the Court in *Jacobson* had narrowed the definition of predisposition, requiring greater proof from the Government on that issue. How did he reach this conclusion? First, he argued that this interpretation provided the only logical means of explaining the Court's holding. As he explained:

[H]ad the Court in *Jacobson* believed that the legal concept of predisposition is exhausted in the demonstrated willingness of the defendant to commit the crime without threats or promises by the government, then *Jacobson* was predisposed, in which event the Court's reversal of his conviction would be difficult to explain.<sup>135</sup>

Thus, because the Seventh Circuit in *Hollingsworth* could not believe that the Court would have acquitted *Jacobson* under a definition of predisposition focused only on the defendant's willingness to commit the crime without inducement, it assumed that the Supreme Court must have had a different definition of predisposition in mind when it decided the *Jacobson* case.<sup>136</sup>

Judge Posner's contention that *Jacobson* cannot be explained without resorting to this expanded definition of predisposition is flawed. Whether or not the Supreme Court was correct in its evaluation of the sufficiency of the evidence, nothing in the *Jacobson* opinion suggests that the Court believed the defendant to be someone "willing" to purchase child pornography without the urging of the Government. In fact, the Court expressly found the evidence inadequate to support such a conclusion. First, the Court decided that the defendant's interest in child pornography, established by his legal purchase of a magazine containing child pornography, did not suffice to establish his predisposition to violate the law in order to obtain such material. "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is

134. *Hollingsworth*, 27 F.3d at 1198. In dissent, Judge Easterbrook chastised Judge Posner for ignoring the express language of the Court:

*Jacobson v. United States*, which the majority invokes to justify its novel treatment of entrapment, purported to leave this corner of the law as the Court found it. . . . [M]ore often language tracking prior law means that nothing has changed. . . . Judges of an inferior court do best to take doctrine seriously, to treat the Justices as honest expositors.

*Id.* at 1212 (Easterbrook, J., dissenting) (citations omitted).

135. *Id.* at 1199.

136. Judge Posner elaborated, saying that "[i]t was not as if the government had to badger *Jacobson* for 26 months in order to overcome his resistance to committing a crime. He never resisted." *Id.*

now illegal, for there is a common understanding that most people obey the law even when they disapprove of it.”<sup>137</sup> This statement clearly sets forth the Court’s belief that the evidence was insufficient to establish Jacobson’s willingness to violate the law in order to obtain child pornography.

Second, the Court completely discounted the defendant’s lack of reluctance in *Jacobson* because of the protracted nature of the Government’s inducement efforts. As the Court noted, “[b]y the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from government agents and fictitious organizations.”<sup>138</sup> Thus, although the defendant was predisposed by the time he finally placed the order in May 1987, “the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at [the defendant] since January 1985.”<sup>139</sup> Once again, the Court’s position seems clear: although the evidence demonstrated the defendant’s willingness to purchase child pornography in May 1987, this willingness could have been a product of the Government’s extensive attention and not the defendant’s predisposition to commit the charged offense.<sup>140</sup> Because the pre-inducement evidence did not establish the defendant’s willingness to violate the law without such efforts (at least in the eyes of the majority), the Court had no choice but to find entrapment as a matter of law.<sup>141</sup>

One commentator questioned the Court’s decision to reverse the jury’s verdict, arguing that the Court gave insufficient weight to the evidence presented by the prosecution.<sup>142</sup> Regardless of where one stands on that issue, it is clear that the Court did not believe that the

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137. *Jacobson*, 503 U.S. at 551. Judge Posner’s failure to address this portion of the Court’s opinion is hardly surprising. The Court’s focus on the legality of the defendant’s prior conduct is relevant only if the Court was concerned about the defendant’s state of mind, as opposed to his objective circumstances. If the defendant in *Jacobson* was so eager and willing to purchase child pornography prior to the Government’s involvement, the Court would not have paused to consider this evidence. That the Court did so reflects its concern that this defendant may not have been willing to violate the law without the government’s inducement efforts.

138. *Id.* at 550.

139. *Id.*

140. “[I]n *Jacobson* the Court was not concerned with the defendant’s positioning . . . but rather with the fact that the government’s inducement campaign lasted over twenty-six months and the defendant’s ultimate willingness to purchase the unlawful child pornography was in large part due to the government’s repeated persuasive efforts.” *Hollingsworth*, 27 F.3d at 1211 (Coffey, J., dissenting).

141. “Rational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition prior to the Government’s investigation and that it existed independent of the Government’s many and varied approaches to [the defendant].” *Jacobson*, 503 U.S. at 553.

142. See Paton, *supra* note 92, at 1028 (arguing that the evidence presented in *Jacobson* entitled the jury to find that the defendant was predisposed).

evidence established Jacobson's willingness to engage in illegal activity absent the inducement by the Government.<sup>143</sup> If Judge Posner is puzzled as to how the Court could take such a position, his position is arguably justified. But when he insinuates that the majority's conclusion is so unreasonable as to be nonexistent, he is simply ignoring a decision reached by the highest court in the land.

Not surprisingly, Judge Posner did not rest exclusively on this dubious proposition to support his reading of *Jacobson*. Instead, he sought to support his position with explicit language from *Jacobson*. As his opinion explained, the *Jacobson* majority articulated a definition of predisposition "not found in previous opinions."<sup>144</sup> This "definition," found near the end of the Court's opinion, stated that "[w]hen 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."<sup>145</sup> From this statement, Judge Posner argued that *Jacobson* had "clarified" the meaning of predisposition to include an objective component.<sup>146</sup> Hence, according to Judge Posner, the key question in ascertaining a defendant's predisposition is to ask whether the defendant, "if left to his own devices," is someone who likely would have "run afoul of the law."<sup>147</sup> Moreover, whether a person is likely to "run afoul of the law" depends not only on the defendant's willingness to violate the law, but also on his or her objective circumstances.<sup>148</sup>

As noted above, Judge Posner did not believe that the *Jacobson* majority regarded the defendant as unwilling to violate the law without inducement.<sup>149</sup> Instead, Judge Posner argued that the Court believed that Jacobson was unlikely to run afoul of the law because of his objective circumstances.<sup>150</sup> Specifically, Judge Posner argued that because of Jacobson's geographical location and limited access to child pornography, it is unlikely that he would have run afoul of the law if the Government had not intervened.<sup>151</sup> To support this

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143. See *Hollingsworth*, 27 F.3d at 1211 (Coffey, J., dissenting).

144. *Id.* at 1199.

145. *Jacobson*, 503 U.S. at 553-54.

146. See *Hollingsworth*, 27 F.3d at 1200.

147. *Id.* at 1199. "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." *Id.* at 1200.

148. See *id.* at 1200.

149. See *id.* at 1199; *supra* note 132.

150. See *Hollingsworth*, 27 F.3d at 1199.

151. Judge Posner discussed the defendant in *Jacobson* and noted:

[As a] farmer in Nebraska, his access to child pornography was limited. As far as the government was aware, over the period of more than two years in which it was playing cat and mouse with him he did not receive any other solicitations to buy pornography. So, had he been "left to his own devices,"

argument, Judge Posner noted that the Government was unaware of any mailings received by the defendant from those outside the Government during its two-and-a-half year investigation.<sup>152</sup>

Judge Posner conveniently avoided noting the context in which the majority's recognition of this fact was discussed. The majority stated that the Government had failed to adduce any evidence that the defendant "had ever intentionally possessed or been exposed to child pornography."<sup>153</sup> The Court then noted that, as far as the Government was aware, the defendant had not received any mailings from a non-governmental source during the course of its investigation.<sup>154</sup> When put in context, the fact that the defendant may not have received any questionable mailings from private sources does not show any concern by the Court about whether the defendant was someone likely to be exposed to this material. Instead, the Court seemed concerned only about the defendant's interest in obtaining such material (which might have been shown by his proactive efforts to receive these "questionable mailings").

Moreover, if the majority was so concerned about the defendant's limited access to child pornography, one wonders why the Court would fail to mention this fact during the analysis portion of its opinion. The majority did recognize that, as far as the Government was aware, the defendant had received no questionable mailings from private sources during the course of the Government's investigation.<sup>155</sup> The Court, however, pointed out this fact in Part I of its opinion, the section that sets forth the case's factual background.<sup>156</sup> In Part II of the opinion, the analysis section, the Court never expressly referenced the defendant's limited access to child pornography.<sup>157</sup> Thus, the Court did not rest its decision on whether the defendant, because of his objective circumstances, was unlikely to run afoul of the law. Instead, the Court was only concerned about whether the defendant was willing to violate the law in order to obtain child pornography "prior to" and "independent of" the Government's inducements.<sup>158</sup>

What then, did the Court mean when it said that the courts should intervene "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his

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in all likelihood, he would "have never run afoul of the law."

*Id.* at 1199 (citations omitted).

152. *See id.* at 1199 (citing *Jacobson v. United States*, 503 U.S. 540, 546 (1992)).

153. *Jacobson*, 503 U.S. at 546.

154. *See id.*

155. *See id.*

156. *See id.*

157. As Judge Ripple remarked in *Hollingsworth*, "one can search the *Jacobson* opinion in vain for any indication that the Justices showed the slightest interest in bestowing upon the concept of predisposition 'positional as well as dispositional force.'" *Hollingsworth*, 27 F.3d at 1217 (Ripple, J., dissenting) (quoting the majority opinion, *id.* at 1199).

158. *See Jacobson*, 503 U.S. at 553.

own devices, *likely* would have never run afoul of the law[?]"<sup>159</sup> Did the Court mean that defendants who are willing to violate law, but who are in a position where such a violation is unlikely to occur, should be given the benefit of the entrapment defense? If read literally, the Court's statement *might* support such a conclusion. The Court, however, did not mean that *any* defendant who is unlikely to run afoul of the law, for whatever reason, should be entitled to an entrapment defense. In fact, the Court in *Jacobson* posited a hypothetical that directly undercuts such a notion:

Had the agents in this case simply offered [the defendant] the opportunity to order child pornography through the mails, and [defendant]—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>160</sup>

The Court's indifference to a defendant's objective circumstances could not be more obvious. The Court recognized that *if* an opportunity to commit a crime was presented without any inducements, the defendant's eager acceptance of such an opportunity would amply demonstrate the defendant's predisposition, rendering the entrapment defense unavailable.<sup>161</sup> The Court never qualified this statement by discussing the probability of such an opportunity occurring if the defendant was "left to his own devices."

Put in context, this statement by the Court does not appear to endorse Judge Posner's interpretation of *Jacobson* as a case that redefined the predisposition requirement to include a positional element.<sup>162</sup> Instead, the statement seems to reiterate the traditional standard of predisposition. After all, if a defendant is unwilling to commit a crime without the Government's inducements, then that defendant is a "law-abiding citizen" who is "likely to never run afoul

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159. *Id.* at 553-54 (emphasis added).

160. *Id.* at 550.

161. *See id.*

162. In *Hollingsworth*, Judge Posner argued that *Jacobson* did not add an additional element to the entrapment defense. As he explained, the defense still contains only two elements: inducement, and most importantly, predisposition. *See Hollingsworth*, 27 F.3d at 1199. As he reads *Jacobson*, the Court "clarified" the meaning of predisposition by pointing out that predisposition is "not a purely mental state," but instead has "positional as well as dispositional force." *Id.* at 1200. However one wishes to characterize Judge Posner's interpretation of *Jacobson*, it does require an assessment of the defendant's position or objective circumstances. According to the standard he proposes, in addition to establishing the defendant's willingness to commit a crime, the government must now also show that the defendant had the ability to commit the crime "if left to his own devices." *Id.* at 1198. This additional burden on the Government may be characterized as a third step to the entrapment defense, or the second step to the second element of the entrapment defense. Because the Government's burden remains the same under either approach, how one chooses to characterize the burden is irrelevant.

of the law.” For these defendants, a court should intervene and allow an entrapment defense. The Court’s opinion, however, in no way endorses the notion that a person willing but unlikely to commit a crime is the sort of “law-abiding citizen” for whom an entrapment defense should be available.<sup>163</sup>

Now look at the disputed passage in *Jacobson*: “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.”<sup>164</sup> The language in *Jacobson* appears to be nothing more than a reformulation of the standard used in *Sorrells*. As in any entrapment case, the defendant must lack predisposition in order to take advantage of the defense.<sup>165</sup> The use of phrases such as “otherwise innocent” and “law-abiding” in *Sorrells* and *Jacobson* appear to be synonyms for defendants who lack predisposition. Thus, before one can even discuss the probability that the defendant will commit the charged crime, the defendant must be classified as an “otherwise law-abiding citizen.” Nothing in the Court’s analysis suggests that willing-but-unlikely criminals should be put in this group. As Judge Easterbrook aptly noted, “[i]solated phrases do not alter the law when the bulk of an opinion professes otherwise.”<sup>166</sup> Thus, not only was Judge Posner incorrect when he argued that *Jacobson* cannot be explained under the traditional standard of predisposition that focuses only on the defendant’s state of mind, but he also incorrectly asserted that the Court’s use of the word “likely” requires an assessment of a defendant’s objective circumstances.

To be fair, Judge Posner is not alone in endorsing this interpretation of *Jacobson*. In fact, a leading commentator on the entrapment defense, Paul Marcus, has joined Judge Posner in advocating this “but-for causation” approach to predisposition.<sup>167</sup>

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163. In his *Hollingsworth* dissent, Judge Easterbrook argued that the disputed passage from *Jacobson* was nothing more than a recharacterization of the Court’s traditional entrapment standard. “Every opinion contains language slightly different from its predecessors, if only for the sake of elegant variation.” *Id.* at 1212. What was the “elegant variation” in *Jacobson*? Compare the following statement in *Sorrells v. United States*, where the Court held:

The evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, *law-abiding citizen*, and that the agent lured defendant, *otherwise innocent*, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.

287 U.S. 435, 441 (1932) (emphasis added).

164. *Jacobson*, 503 U.S. at 553-54 (emphasis added).

165. See *supra* note 28.

166. *Hollingsworth*, 27 F.3d at 1212 (Easterbrook, J., dissenting).

167. See Marcus, *Back from the [Almost] Dead*, *supra* note 27, at 222-23.

Professor Marcus argues that the *Jacobson* opinion represents a fundamental shift in the application of the entrapment defense. "The language of the Supreme Court in *Sherman* and *Jacobson* signals genuine movement from an exclusive focus on the defendant's state of mind to a much more searching view of the Government's behavior."<sup>168</sup> According to Professor Marcus, the Court has adopted a "but for causation" approach to entrapment; if the defendant would not have committed the crime but-for the Government's involvement, the defendant should be entitled to an entrapment defense. Furthermore, as Judge Posner recognized, whether a defendant will commit a crime depends not only on his willingness but also on his position or objective circumstances.<sup>169</sup> If this view of entrapment is accepted, the defense will become much more popular, and prosecutors presumably will become much more reluctant to indict people for crimes induced by government informants.

Like Judge Posner, however, Professor Marcus misinterprets *Jacobson* when he said that the Court endorsed this causation-oriented approach to entrapment.<sup>170</sup> Professor Marcus relies on the dubious proposition espoused by Judge Posner that *Jacobson* can be explained only by resorting to this new definition of predisposition.<sup>171</sup> He too greatly emphasizes the defendant's lack of reluctance and how the Court could not possibly have believed that the defendant was unwilling to commit this crime.<sup>172</sup> Like Judge Posner, Professor Marcus ignores the Court's handling of the defendant's lack of reluctance. For the Court, the defendant's lack of reluctance had little probative value in establishing his predisposition because the defendant's eagerness to violate the law could easily have been the result of the Government's protracted mailing campaign and not the defendant's independent desire to purchase child pornography.<sup>173</sup> An honest reading of the Court's opinion leads to the inevitable conclusion that the Court was not satisfied that *Jacobson* would have committed this crime without the Government's extensive inducements.<sup>174</sup>

To the extent that Professor Marcus argues that *Jacobson* shifted the focus from the defendant's state of mind to the Government's conduct,<sup>175</sup> he is partially correct. No doubt *Jacobson* has led many lower courts to give more attention to the Government's conduct in assessing a defendant's predisposition.<sup>176</sup> The problem, however, is

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168. *Id.* at 219.

169. *See Hollingsworth*, 27 F.3d at 1200.

170. *See Marcus*, *Back from the [Almost] Dead*, *supra* note 27, at 222-23.

171. *See id.* at 230-31.

172. *See id.*

173. *See Jacobson v. United States*, 503 U.S. 540, 553 (1992).

174. *See supra* notes 133-41.

175. *See supra* notes 167-70 and accompanying text.

176. *See Marcus*, *Back from the [Almost] Dead*, *supra* note 27, at 225-27.

that Professor Marcus never adequately explains why the lower courts have taken the Government's conduct into consideration. The reason is not because *Jacobson* ignored the defendant's state of mind. To the contrary, the Court's primary concern in *Jacobson* was that the defendant's state of mind was the product of the Government's prolonged attention, evidenced by a twenty-six-month mailing campaign.<sup>177</sup> Professor Marcus is correct when he stated that *Jacobson* requires a more searching inquiry into the Government's conduct, but the focus on the Government's conduct is inexorably intertwined with inquiry into the defendant's state of mind. In other words, the Court is only concerned about the Government's conduct because of the effect such conduct might have on the defendant's state of mind.

The Court's approach does resemble a causation inquiry, but not in the "but-for" sense that Professor Marcus advocates. Instead, the Court asks whether the defendant's willingness or desire to commit the crime is a result of his previously held mental state or the Government's inducement efforts.<sup>178</sup> In *Jacobson*, the Court decided that although the defendant was willing to violate the law and purchase child pornography in May of 1987, the Government failed to show that this willingness was the result of his preconceived mental state and not the Government's extensive mailing campaign.<sup>179</sup>

If *Jacobson* is so clear, one might logically ask why both Judge Posner and a leading entrapment scholar like Professor Marcus would mischaracterize the Court's holding. Maybe these two respected scholars have simply misconstrued the Court's language, or perhaps underneath their purported interpretation of *Jacobson* lies another agenda.<sup>180</sup> In support of their position, both Judge Posner and Professor Marcus argue that as a policy matter, their "but-for causation" approach to predisposition leads to the most socially productive results.<sup>181</sup> Judge Posner contends that if resources are used on criminals who, if left alone, would not commit crimes, "resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime."<sup>182</sup>

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177. See *Jacobson*, 503 U.S. at 552-53.

178. See, e.g., *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) (rejecting expansion of the two-prong entrapment test).

179. See *Jacobson*, 503 U.S. at 553.

180. An examination of Judge Posner's writings indicates why he may not be substantively enamored with the traditional subjective approach to entrapment. As he has noted in the past, "mental entities in law—intent, premeditation, 'free will' . . . are entities of distinctly dubious ontology." See Richard A. Posner, *The Problems of Jurisprudence* 167-68 (1990). Because the traditional approach to entrapment has treated predisposition as a "mental entity," Judge Posner's discomfort with such a standard is understandable.

181. See *supra* notes 167-69 and accompanying text.

182. *United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J.,

Intuitively, this argument has great appeal. After all, if a person is not likely to violate the law in the absence of government intervention, either because he is unwilling or unable, why should we squander resources prosecuting him. The money could be better spent on those who in all probability *will* violate the law without the Government's inducement.

The problem, however, is that the Court has never endorsed such a utilitarian approach to the issue of entrapment.<sup>183</sup> Again, look back to the hypothetical offered by the Court in *Jacobson*.<sup>184</sup> The Court made it clear that a person who affirmatively responded to an initial solicitation (without further inducement) would likely be denied even a jury instruction on entrapment.<sup>185</sup> As a factual matter, the person could be in the same position as the defendant in *Jacobson*, an isolated Nebraska farmer. This person might never be exposed to such a solicitation if the Government fails to make the offer. Yet, as the Court makes clear, a person who takes advantage of this opportunity will not be entitled to a defense of entrapment because their ready acceptance of the opportunity amply demonstrates predisposition under a standard that focuses only on the defendant's willingness to commit such a crime without inducements by the Government.<sup>186</sup> The Court never paused to consider, as Professor Marcus's approach would seem to require, whether such an opportunity would likely have been presented in the Government's absence. Thus, *Jacobson* cannot plausibly be read to support the "but-for causation" approach to predisposition advocated by Professor Marcus.

Furthermore, despite the intuitive appeal of Judge Posner's law and economics theory, one can seriously question whether his causation-oriented approach to predisposition leads to more socially productive results. First, prosecutors would be forced to prove that if they had not offered the defendant an opportunity to commit the crime, someone else would likely have offered it.<sup>187</sup> Those who support

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concurring).

183. To see the influence of Judge Posner's law and economics theory in his entrapment decisions, one need only refer back to the *Kaminski* opinion. See 1009-10. In that case, Judge Posner argued that "if the police are just inducing someone to commit sooner a crime he would have committed eventually, but to do so in controlled circumstances where the costs to the criminal justice system of apprehension and conviction are minimized, the police are economizing on resources." *Id.* at 1009.

184. See *supra* notes 155-60 and accompanying text.

185. See *Jacobson v. United States*, 503 U.S. 540, 550 (1992).

186. See *id.*

187. See, e.g., *United States v. Hollingsworth*, 27 F.3d 1196, 1213 (7th Cir. 1994) (Ripple, J., dissenting). Among other things, Judge Ripple noted that prosecutors must now show that the defendant had a "sufficient aptitude" to commit the crime. *Id.* at 1217; see also Eliot Rothstein, Note, *Criminal Law—United States v. Hollingsworth: The Entrapment Defense and the Neophyte Criminal—When the*

Judge Posner's position, such as Professor Marcus, dismiss this concern and dogmatically assert that such a prosecutorial burden would not be onerous.<sup>188</sup> Yet they fail to explain how the Government should go about proving how some party not involved in the criminal case would have acted in the Government's absence. Second, no matter how unlikely, there is always a chance that some private individual might offer the defendant an opportunity to engage in a criminal endeavor. Those defendants willing to accede to such a request therefore pose a threat to society.<sup>189</sup>

#### IV. POLICY CHOICES SUPPORT THE NEED FOR A MORE SPECIFIC UNDERSTANDING OF ENTRAPMENT AS IMPOSING AN ADDITIONAL MENS REA PROOF REQUIREMENT

Criminal laws that lack the support of a substantial societal majority because of a failure to incorporate a clear moral component are likely to fail. The Court's creation of the entrapment defense, applicable when government agents create or induce a crime, was a re-assertion of this moral component of criminal law. The heightened importance of recognizing such a moral component in enforcement targeting "crimes" based substantially on the defendant's mens rea, when the evidence consists largely of his spoken word, cannot be overemphasized, particularly in an era of "political" crimes investigated by independent counsel.

The Court in recent years, however, has been reluctant to engage in such a policy-making role, leaving such matters to elected officials.<sup>190</sup>

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*Commission of a Criminal Act Does Not Constitute a Crime*, 17 W. New Eng. L. Rev. 303, 330 (1995) (discussing the burdens on prosecutors with respect to first-time offenders).

188. See, e.g., Marcus, *Back from the [Almost] Dead*, *supra* note 27, at 236. Professor Marcus says that a positional inquiry such as that adopted by the *Hollingsworth* court "hardly imposes an onerous burden on the prosecution." *Id.* He claims that those defendants who exhibit little reluctance will demonstrate their predisposition, rendering the defense practically unavailable. See *id.* This conclusion hardly follows from the standard he advocates. Even if a defendant is willing to commit the crime without any pressure by the Government, under the standard proposed by Professor Marcus, the Government must still show that the defendant would likely have faced such an opportunity had the Government not made the offer. He fails to explain how the Government should go about proving what hypothetical actors would do in the government's absence.

189. To put the matter in law and economics terms, society receives a benefit from capturing those people who are willing to commit crimes should the opportunity be presented. Is that benefit worth the costs (both in resources and in terms of the lost opportunity to pursue other criminals) of going after those who are not "likely" to commit crimes absent government inducement? Arguably not, but the question the courts must ask is whether they are in a better position vis-a-vis the executive branch, the body charged with enforcing the law, to make such a judgment regarding the allocation of executive resources.

190. See *United States v. Russell*, 411 U.S. 423, 433 (1973) (declining to extend the

*Jacobson*, despite the pleas of Judge Posner and Professor Marcus, is no different. The Court in *Jacobson* did nothing more than apply the traditional entrapment defense to a very special set of facts. The Court did not purport to break new ground with its decision.<sup>191</sup> Thus, whatever utilitarian merits Judge Posner's approach to entrapment might have, his position simply does not represent the definition of predisposition used by the Court in *Jacobson* and lacks an adequate moral component.

#### A. An "Ordinary Opportunity" Analysis

If Judge Posner's "but-for" approach to predisposition is inconsistent with *Jacobson*, one must then ask whether an "ordinary opportunity" analysis fits with the definition of predisposition implicitly adopted by the Court in that case. This predisposition question asks whether a defendant would be willing to commit a crime if given an ordinary opportunity.<sup>192</sup> In *United States v. Gendron*,<sup>193</sup> then-Judge Breyer defined an "ordinary opportunity" as a government-sponsored solicitation that cannot be classified as an improper inducement.<sup>194</sup> As one may recall, government inducement of the crime is a necessary element of an entrapment defense.<sup>195</sup> If inducement cannot be established, a defendant will not be able to even raise an entrapment defense. Moreover, simply offering a defendant an opportunity to commit a crime, without more, does not establish government inducement.<sup>196</sup> Thus, as Judge Breyer conceived the entrapment defense, once the Government's inducement *has* been established, the Government must show that the defendant would have been willing to commit the charged crime in the absence of such an inducement. In other words, if the Government were to simply offer the defendant an "ordinary opportunity" to commit a crime, without more, would the defendant be willing to take advantage of such an opportunity?<sup>197</sup> If the answer is yes, Justice Breyer argues that

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entrapment defense to non-predisposed defendants and acknowledging Congress's power to change the doctrine should it be so inclined).

191. See *Jacobson*, 503 U.S. at 549; see also *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) ("[A]pplying settled entrapment law.").

192. See *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994).

193. 18 F.3d 955 (1st Cir. 1994).

194. See *id.* at 961.

195. See *supra* note 28.

196. As Judge Breyer defined it, "[a]n improper 'inducement,' however, goes beyond providing an ordinary 'opportunity to commit a crime.' An 'inducement' consists of an 'opportunity' *plus* something else—typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive." *Gendron*, 18 F.3d at 961 (citations omitted). Judge Breyer then lists a variety of situations where courts have found improper inducements. See *id.* at 961-62.

197. See *id.* at 962 ("[Is] the defendant 'predisposed' to respond affirmatively to a *proper*, not to an *improper*, lure?").

such a defendant should not be entitled to a defense of entrapment.

Unlike Judge Posner's "but-for" approach to predisposition, Judge Breyer's definition, although vague, fits nicely with the Court's analysis in *Jacobson*. The Court, in fact, seems to have endorsed such an approach explicitly in the hypothetical posited in *Jacobson*. As discussed earlier, the Court said that a defendant's eager response to a mere opportunity to commit a crime would almost certainly destroy that defendant's hopes of asserting a defense of entrapment.<sup>198</sup> The problem, as Judge Breyer recognized in *Gendron*, was that the defendant in *Jacobson* was not simply offered an opportunity to commit a crime. Instead, the Government badgered him for nearly two-and-a-half years before finally giving him the opportunity to commit the crime.<sup>199</sup> Because the Government could not show that the defendant was willing to commit such a crime before such coaxing, the Government failed to establish that the defendant would have been willing to commit the charged offense if given an "ordinary opportunity."<sup>200</sup>

Judge Breyer's approach also has textual support in *Jacobson*. The passage used by Judge Posner to support his definition of predisposition more accurately reflects the type of analysis endorsed by Judge Breyer in *Gendron*.<sup>201</sup> The Court's reference to an "otherwise" law-abiding citizen supports Judge Breyer's description of the predisposition inquiry. As he puts it, the "otherwise" reference requires a court to "abstract from . . . present circumstances."<sup>202</sup> A court must "assume away . . . the present circumstances *insofar as they reveal government overreaching*" and "ask how the defendant likely would have reacted to an *ordinary* opportunity to commit the crime."<sup>203</sup>

Why should the Government's overreaching be "assumed away?" Is such a statement consistent with *Jacobson's* emphasis on the Government's conduct? Absolutely. Judge Breyer does not argue that government misconduct is irrelevant in assessing predisposition. As the *Jacobson* Court noted, the Government's conduct has a bearing in assessing the probative value of the defendant's reluctance in relation to the Government's solicitation.<sup>204</sup> In answering the

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198. See *Jacobson v. United States*, 503 U.S. 540, 550 (1992).

199. See *id.*

200. See *Gendron*, 18 F.3d at 963 (noting that the government in *Jacobson* did much more than provide an ordinary opportunity to buy child pornography, a fact that was conceded by the Government).

201. That passage says: "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." *Jacobson*, 503 U.S. at 553-54 (emphasis added).

202. *Gendron*, 18 F.3d at 962.

203. *Id.* (emphasis added).

204. See *Jacobson*, 503 U.S. at 553.

ultimate question of predisposition, however, the court (or jury) must “assume away” the Government’s conduct and ask how the defendant would have responded had that conduct not been present. As Judge Breyer recognized, one knows how the defendant responded to the inducement. To ask how the defendant would respond in similar circumstances would make the predisposition inquiry a tautological one.<sup>205</sup> The issue is how he would respond to an “ordinary opportunity” to commit the crime—one that does not involve the sort of excessive pressure of an improper inducement.<sup>206</sup> Because the opportunity in *Jacobson* was “ordinary,” in Judge Posner’s view, the *Gendron* analysis failed to explain the Court’s decision in *Jacobson*.

As with the *Jacobson* decision, however, a closer reading of the *Gendron* case by Judge Posner might have cleared up his confusion. Justice Breyer did not purport to define “ordinary” by reference to private inducements. Instead, by “ordinary,” he meant opportunities that did not rise to the level of an “improper inducement.”<sup>207</sup> He described an “improper inducement” as “an ‘opportunity’ plus something else—typically, excessive pressure by the Government upon the defendant.”<sup>208</sup> Thus, when Justice Breyer spoke of “ordinary” opportunities, he simply meant government-sponsored opportunities to commit crimes without excessive additional pressure. He in no way defined “ordinary” with respect to the types of inducements that private actors might use to encourage someone to commit a crime. In answering that question, the defendant’s response to the Government’s actual inducements may or may not be relevant.<sup>209</sup>

If the Court wishes to adopt an approach that is consistent with

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205. When a defendant has already relented to the government’s inducement, it simply makes no sense to ask whether he would relent to similar pressure in another situation. As Justice Breyer recognized, a defendant’s “present behavior virtually compels an affirmative answer to the question phrased in this way.” *Gendron*, 18 F.3d at 962.

206. Understanding the meaning of an “ordinary” opportunity is critical to understanding Justice Breyer’s approach to *Jacobson*. In *Hollingsworth*, Judge Posner described Justice Breyer’s interpretation of *Jacobson* as follows:

Recently the First Circuit, struggling as are we to understand the scope of *Jacobson*, suggested that all it stands for is that the government may not, in trying to induce the target of a sting to commit a crime, confront him with circumstances that are different from the ordinary or typical circumstances of a private inducement.

United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir. 1994).

207. See *Gendron*, 18 F.3d at 962.

208. *Id.* at 961.

209. Where the defendant is reluctant in the face of the government’s inducement efforts, such reluctance may be probative evidence that the defendant lacks predisposition. See *supra* note 75. In contrast, a defendant’s eager acceptance of a mere opportunity to commit a crime indicates the defendant’s affirmative predisposition to commit the charged crime. See *Jacobson*, 503 U.S. at 550. As *Jacobson* noted, however, a defendant’s response may have very little probative value when it occurs in the wake of extreme inducement by the government. See *id.* at 553.

both the spirit and letter of *Jacobson*, the “ordinary opportunity” analysis carries much promise. Instead of relying on far-fetched readings of the facts, or isolated phrases in a particular sentence, the “ordinary opportunity” analysis actually comports with the Court’s entire disposition of the legal issues in *Jacobson*. Whether the Court will be content with following *Jacobson* in light of the possible ambiguities in the case, however, is another matter.

Assuming that *Jacobson* was sufficiently ambiguous, and that the meaning of predisposition cannot simply be ascertained by reading the Court’s decision in that case, how does a prosecutor prove predisposition? An operating premise that should guide the courts in answering this question is the notion that the entrapment defense is by its very nature a limited defense, focusing more specifically on the defendant’s mens rea. To understand the limited nature of the defense, one must go back to the Court’s previous decisions that both recognize and define the parameters of this defense.<sup>210</sup> Again, entrapment is an affirmative defense which is relevant only when the defendant has, in fact, committed all elements of an offense, including the requisite mens rea. Although criticized as having no explicit or implicit statutory support, the Court initially premised the availability of the entrapment defense on the intent of Congress. The *Sorrells* Court did not believe that Congress would want its statutes enforced when government agents persuaded innocent persons to commit crimes so that they could then be prosecuted.<sup>211</sup>

Perhaps that is not what Congress desired. Yet, how could the Court possibly have known this without some indication by Congress, either in the text or legislative history of a criminal statute? In *Sherman v. United States*,<sup>212</sup> Justice Frankfurter, who also believed that an entrapment defense should be available, acknowledged the weakness in the Court’s rationale: “In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged.”<sup>213</sup> Other commentators have also noted the fictional nature of the Court’s reliance on legislative intent to justify its decision.<sup>214</sup> If one accepts the notion that the Court was being fast and loose with its reasoning in *Sorrells*, is there any reason the Court should feel bound to construe the defense in light of a principle that is well-understood to be nothing more than a legal fiction? After all, if the Court was creating this

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210. See *supra* Part II.

211. See *Sorrells v. United States*, 287 U.S. 435, 448 (1932).

212. 356 U.S. 369 (1958).

213. *Id.* at 379 (Frankfurter, J., concurring).

214. See, e.g., Feeney, *supra* note 31, at 1036-38 (noting that critics have raised objections about entrapment law, including the notion that legislative intent as the basis for a defense is sheer fiction).

defense from whole-cloth, why should the Court now feel obligated to confine the defense to its original parameters? In other words, why should the Court not simply “presume” that Congress would want statutes enforced in a manner most consistent with notions of good, efficient law enforcement policy?

The simple answer to these questions is that it is not the role of the Court to make such policy choices. Perhaps the Court overreached in *Sorrells* when it presumed that Congress would not want its statutes enforced against “innocent persons” induced to commit crimes by the creative activity of law enforcement officials. Arguably, if the Court were deciding the issue on a clean slate, it should simply enforce the statute as written or rely on a constitutional provision to deny enforcement.<sup>215</sup> The issue, however, is not one of first impression. No matter how dubious the Court’s reasoning may have been in 1932, the present Court can still rely on the same rationale in interpreting the entrapment defense. After all, the Court based its decision on the intent of Congress.<sup>216</sup> Perhaps the Court had no basis for inferring such an intent in 1932. After sixty years of Congressional inaction in the face of six Supreme Court decisions reaffirming the existence of the defense, however, the present Court has ample basis for relying on Congress’s intent. Thus, the Court can safely rely on its previous decisions as being consistent with the intent of Congress.

In sum, the logic is as follows: First, Congress prohibits certain activities with criminal statutes. Those who fall within the intended coverage of the statutes can be classified as “Group A.” The Court then “unjustifiably” protects a certain class, “Group B,” from coverage under these statutes.<sup>217</sup> After the Court does this, however, Congress fails to react and extend the scope of these statutes to “Group B” over the course of sixty years and six Supreme Court decisions that protected this class from the purview of the statute. Thus, in light of Congress’s long-standing inaction, the Court can now justifiably conclude that “Group B” is outside the scope of Congress’s

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215. The Court in *Russell* made it clear that the judiciary should not have a “chancellor’s foot veto” over law enforcement practices of which it does not approve. *United States v. Russell*, 411 U.S. 423, 435 (1973). Yet, the Court seems to have used such a veto when it first recognized the defense of entrapment in *Sorrells* because the Court had no explicit or implicit basis for inferring a Congressional intent to preclude punishment in situations involving entrapment. In fact, the Court has identified another possible defense in situations similar to entrapment: the outrageous conduct defense founded upon principles of due process. The contours of such a defense, if it even exists, are beyond the scope of this Article. *See supra* note 24.

216. *See supra* note 19 and accompanying text.

217. By referring to the government’s actions as being “unjustifiable,” the Court may have no constitutional basis for refusing to enforce the statute. Because the Court has stated that the run-of-the-mill entrapment case does not implicate a defendant’s due process rights, this assumption normally seems appropriate. *See Russell*, 411 U.S. at 431-32. However, due process considerations should play a role in creating an interpretive rule for entrapment.

intended coverage.

In *United States v. Russell*, the Court seemed content with such a rationale. The defendant in that case was seeking to have the Court extend the entrapment defense to predisposed defendants.<sup>218</sup> In construing the scope of the defense, the Court made reference to those who criticized the “implied intent of Congress” rationale used by the *Sorrells* Court to justify the entrapment defense.<sup>219</sup> While the Court acknowledged that such arguments were “not devoid of appeal,” it declined to revisit the issue yet again, noting that the Court had relied on this rationale on two previous occasions.<sup>220</sup> Elaborating even further, the Court later said:

[E]ntrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been ‘overzealous law enforcement,’ but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government.<sup>221</sup>

After reading the Court’s opinion, one comes away with the almost unmistakable impression that the Court relied on Congressional inaction in making its decision. First, the Court acknowledges that the rationale of the *Sorrells* Court, which rested on the implied intent of Congress, might not be sound.<sup>222</sup> Nonetheless, the Court ultimately relies on Congress’s intent in construing the scope of the defense because of the Court’s two previous decisions regarding the issue.<sup>223</sup> In fact, the Court at one point invites Congress to take action should it find the Court’s substantive definition of the defense to be inadequate.<sup>224</sup>

Thus, the *Russell* Court seems to have endorsed an approach to entrapment premised on Congressional inaction. The Court in *Sorrells* may or may not have overreached when it protected certain defendants in 1932 from coverage under federal criminal statutes. If the Court misread Congress’s intent, however, one would have

218. *See id.* at 432-33.

219. In *Russell*, the Court observed:

Critics of the rule laid down in *Sorrells* and *Sherman* have suggested that its basis in the implied intent of Congress is largely fictitious, and have pointed to what they conceive to be the anomalous difference between the treatment of a defendant who is solicited by a private individual and one who is entrapped by a government agent.

*Id.* at 433.

220. *See id.* at 433-34.

221. *Id.* at 435.

222. *See id.*

223. *See id.*

224. *See id.* at 433 (“*Sorrells* is a precedent of long standing that has already been once reexamined in *Sherman* and implicitly there reaffirmed. Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable.”).

expected Congress to react accordingly at some point during the past sixty years. The Court, therefore, read Congress's inaction as an implicit endorsement of the Court's decisions in *Sorrells* and *Sherman*, and as license to now preclude application of federal criminal statutes to entrapped defendants.

Relying on Congressional inaction, however, means that the Court is confined to its previous decisions in defining the entrapment defense. Because acquiescence presumes knowledge, Congress must be aware of the interpretation to which it is supposedly acquiescing. The Court in *Russell* understood this. After all, the Court could have "presumed" that Congress would not want its statutes enforced against *anyone* who was induced to engage in criminal activity by the Government's agents. The Court declined to take such an active role, however, and relied on the intent articulated in *Sorrells* and reaffirmed in *Sherman*, which presumed only that Congress would not want its statutes enforced against *non-predisposed* persons that were induced to commit crimes by law enforcement officials.<sup>225</sup> The former approach represents nothing more than a whole-cloth amendment by the judiciary of a federal criminal statute. The latter approach at least possesses the virtue of relying on some tangible evidence of Congressional intent.

B. *Toward a Focus on Historical Evidence of the Defendant's Conduct Reflecting an Original Mens Rea*

How does "Congressional inaction" bear on the question of how predisposition should properly be defined, particularly when the crime consists of spoken words as implied mens rea? The operating premise, as supported above, is that the entrapment defense is a limited defense. As the Court in *Russell* recognized, "the defense is not of a constitutional dimension."<sup>226</sup> The defense was originally and is now based on the intent of Congress.<sup>227</sup> Additionally, no matter how dubious the Court's initial presumption of legislative intent may have been, the intervening years of Congressional inaction have arguably legitimized what may have been an erroneous interpretation of Congress's manifested intent. If this operating premise is correct, then one can safely say that Congress does not wish for its criminal statutes to be enforced against those defendants who are induced to commit crimes, but who lack the predisposition to commit the offenses. In other words, the Court can presume that there exists this "protected class" of defendants whom Congress does not wish to ensnare in its criminal net. The Court, however, cannot expand this class without engaging in the same sort of illegitimate interpretation

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225. *See id.* at 434-35.

226. *Id.* at 433.

227. *See id.*

of Congressional intent that it arguably made in *Sorrells*.

Thus, in defining predisposition, the task should be to reconcile prior cases and come up with a rule of interpretation for predisposition that fairly can be said to depict the Court's traditional approach to entrapment, balancing the twin needs to punish and deter criminality, on one hand, and to prevent government overreaching on the other. When the Court stated that non-predisposed defendants should be exempt from prosecution, Congress could have been said to have endorsed this principle through its inaction. Yet, Congress could have endorsed only that which the Court had proposed.

Thus, the Court's past conception of predisposition should necessarily control in future decisions. If the Court has traditionally viewed a non-predisposed defendant as someone who would not likely have committed the charged crime but for the Government's intervention, then that definition should control because Congress, through its inaction, has at least implicitly acknowledged that these defendants are outside the scope of the relevant statutes. Conversely, if the Court's previous decisions have viewed a non-predisposed defendant as one who was not *willing* to commit the crime absent government intervention, then that definition should also control, for the same reason. If this premise is correct, and assuming for the moment that *Jacobson* plausibly could be read to support the views of either then-Judge Breyer or Judge Posner, the Court should attempt to define predisposition by reconciling *Jacobson* with earlier entrapment decisions like *Sorrells* and *Sherman*. The Court's task would then be to look at these cases and come up with indicia of predisposition that fairly can be said to represent the Court's historical approach to the predisposition question, incorporating more fundamental rules of levity and vagueness when the difference between legitimate and unlawful conduct becomes speculative.

In discussing the entrapment defense, the Court has made several statements that indicate that the Court has traditionally viewed the predisposition requirement as a *mens rea* issue centering on the defendant's willingness to commit the charged offense without inducement by the Government. The first statement, not surprisingly, comes from the Court's first entrapment decision in *Sorrells*. The Court recognized that law enforcement officials must sometimes use "artifice and stratagem . . . [in order] to catch those engaged in criminal enterprises."<sup>228</sup> The Court, however, distinguished the use of such tactics from situations where "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>229</sup> In these

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228. *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

229. *Id.* at 442 (emphasis added).

situations, the Court ultimately concluded that a defendant should be entitled to a defense of entrapment.<sup>230</sup>

This statement gives some insight into the Court's conception of the predisposition requirement. The Court made it clear that a predisposed defendant who does commit a crime could not take advantage of the entrapment defense.<sup>231</sup> The defense arises only when the Government's agents "implant" the disposition in an originally "innocent person."<sup>232</sup> This is not done by providing a defendant with the means he might not have otherwise had as a result of his objective circumstances, but instead, as the Court suggests, by implanting in the "mind" of the defendant the disposition or will to commit the offense.<sup>233</sup> This statement by the Court thus lends credence to the view held by a majority of the circuit courts that the predisposition requirement is one that involves only the defendant's state of mind prior to the Government's intervention (as well as at the time of the offense, itself).<sup>234</sup>

In *Sherman*, the Court again made references to the predisposition requirement that appeared to focus only on the state of mind of the defendant. *Sherman* was a case in which the Court granted certiorari to decide whether a defendant had been entrapped as a matter of law.<sup>235</sup> The Court recognized the factual issue that was presented at trial: "whether the [government agent] had convinced an otherwise *unwilling* person to commit a criminal act or whether [the defendant] was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade."<sup>236</sup> The Court did not disagree with the way the issue was presented at trial, where predisposition was equated with willingness. It only disputed whether the evidence supported the defendant's conviction, ultimately holding that it did not.<sup>237</sup> The Court appeared content with a standard of predisposition that focused only on the defendant's state of mind,

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230. In *Sorrells*, the Court 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 448.

231. See *supra* note 24.

232. See *Sorrells*, 287 U.S. at 442.

233. See *id.*

234. See *United States v. Cecil*, 96 F.3d 1344, 1347-48 (10th Cir. 1996) (contending that the prosecution must prove that the defendant was disposed to commit the criminal act before being approached by government agents); see also *United States v. Barger*, 931 F.2d 359, 360 (6th Cir. 1991) (same); *United States v. Ulloa*, 882 F.2d 41, 43-44 (2d Cir. 1989) (same); *United States v. Gambino*, 788 F.2d 938, 943-44 (3d Cir. 1986) (same).

235. See *Sherman v. United States*, 356 U.S. 369, 370 (1958).

236. *Id.* at 371 (emphasis added).

237. See *id.* at 375-76.

specifically the defendant's willingness to engage in criminal activity without the Government's inducement.<sup>238</sup>

Later in the opinion, the Court pointedly referred to the standard that the prosecution was seeking to establish with its evidence: "The Government's additional evidence in the second trial to show that petitioner *was ready and willing to sell narcotics should the opportunity present itself* was petitioner's record of two past narcotics convictions."<sup>239</sup> This statement gives some indication as to what the Court is analyzing when it assesses the predisposition issue: is the defendant ready and willing to commit the charged crime (here, selling narcotics) should the opportunity present itself? The Court's analysis indicates that the standard focuses only on the defendant's state of mind.

Nowhere in the Court's statement is there any indication of concern about the probability of such an opportunity occurring.<sup>240</sup> The Court seemed concerned only as to whether the defendant was "ready and willing" if such an opportunity were to arise, irrespective of whether such an opportunity was likely to occur.

Of course, proponents of Judge Posner's position might argue that the word "ready" could have been a reference to the defendant's objective circumstances. The predisposition inquiry, under this view, should focus on whether the defendant was both willing and ready, in the sense of being in the position to commit the crime, if an opportunity were presented.<sup>241</sup> After all, if a defendant is psychologically prepared to commit a crime, and if the defendant is also in the position to commit that crime, then the Government's inducement would likely affect only the timing of the offense, not its actual commission.<sup>242</sup>

Such a reading of the word "ready," however, is inconsistent with the Court's language in *Sherman*. First of all, as noted above, the Court seemed content with the factual issue presented at trial: whether the defendant was willing to commit the crime or whether he was persuaded to commit the crime by the Government's agents.<sup>243</sup> The Court never debated whether something more than the defendant's mental state should be considered. Second, the Court's discussion of the evidence presented by the Government makes it clear that the Court was using the terms "ready" and "willing" synonymously. After stating what the defendant's two prior convictions were supposed to prove—namely that the defendant was "ready and willing" to commit the crime "should the opportunity

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238. *See id.* at 376-77.

239. *Id.* at 375 (emphasis added).

240. *See id.* at 370-78.

241. *See United States v. Hollingsworth*, 27 F.3d 1196, 1200 (1994).

242. *See id.* at 1203.

243. *See Sherman*, 356 U.S. at 371.

present itself”—the Court then discussed the probative value of this evidence.<sup>244</sup> The Court found that a five-year-old possession conviction and a nine-year-old sales conviction were insufficient to establish the defendant’s “readiness” to sell narcotics at the time the Government approached the defendant, especially in light of the defendant’s efforts to deal with his addiction.<sup>245</sup>

As Judge Posner recognized in his *Hollingsworth* opinion, a drug addict can be presumed to have the “ability” to commit a crime without government intervention.<sup>246</sup> For such “traditional” targets of sting operations, predisposition is established by showing that the defendant is “willing[ ] to violate the law without extraordinary inducements.”<sup>247</sup> Thus, when the Court in *Sherman* said that the defendant did not have the “readiness” to commit the alleged offense, it did not mean that he did not have the ability or contacts to commit such a crime. Even Judge Posner would seem to concede that a defendant such as the one in *Sherman* would meet his positional test.<sup>248</sup> Instead, when the Court used the word “readiness,” it had to mean that a defendant’s willingness to sell narcotics in 1942 or 1945 did not establish his willingness to commit this same offense in 1949, particularly in light of that defendant’s efforts to overcome his drug addiction. Because the Court used the word “ready” synonymously with “willing,” courts are left with a standard of predisposition that focuses only on the defendant’s state of mind, specifically the defendant’s willingness to commit the charged crime should the opportunity present itself.<sup>249</sup>

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244. *See id.* at 375-76.

245. *See id.*

246. In *Hollingsworth*, Judge Posner explained:

A public official is in a position to take bribes; a drug addict to deal drugs . . . . For these and other traditional targets of stings all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed.

*Hollingsworth*, 27 F.3d at 1200.

Moreover, the defendant in *Sherman* established his “ability” to obtain drugs without the Government’s assistance because the case contained no allegations that the Government provided him with the necessary source from which the sales might be made. Thus, the defendant in *Sherman* was in the position to commit such a crime. *See Sherman*, 356 U.S. at 373-75. The question for the Court was whether he was willing to commit this crime without the government’s inducements. *See id.* at 376-77.

247. *Hollingsworth*, 27 F.3d at 1200.

248. *See supra* notes 126-29 and accompanying text.

249. In his *Hollingsworth* dissent, Judge Ripple argues that a defendant’s “readiness” to commit an offense is circumstantial evidence of the defendant’s willingness to commit such a crime without inducement by the Government. “[T]he alacrity with which the defendant accepts the invitation is circumstantial evidence of his predisposition to commit the illegal act . . . . [T]he Supreme Court has reminded us that predisposition is demonstrated by the defendant’s ‘ready commission of [a] criminal act.’” *Hollingsworth*, 27 F.3d at 1215 (Ripple, J., dissenting) (quoting *Jacobson v. United States*, 503 U.S. 540, 550 (1992)). Thus, as Judge Ripple argues,

The Court confirmed this conclusion in *United States v. Russell*.<sup>250</sup> As noted earlier, the Court had no formal opportunity to address the predisposition requirement; the defendant in that case conceded that a reasonable jury could have concluded that he was predisposed.<sup>251</sup> The Court did, however, discuss the entrapment defense and the role predisposition historically played in the Court's previous entrapment decisions. The Court noted that in *Sorrells*, "the thrust of the entrapment defense was held to focus on the *intent or predisposition* of the defendant to commit the crime."<sup>252</sup> Here again, the Court reaffirmed its conception of what the predisposition inquiry is all about. Furthermore, the Court equated the predisposition requirement to the mens rea element—the defendant's intent to commit a crime.<sup>253</sup> Thus, in *Sorrells*, *Sherman*, and *Russell*, the Court gave every indication that the predisposition issue was one that focuses only on a defendant's state of mind. The Court in these cases never displayed any concern for the defendant's objective circumstances.

To pick through the Court's opinions in this way might seem a bit unrealistic, especially since the operating premise here is that Congress was endorsing the Court's approach to the predisposition issue. After all, if the Court's opinions must be dissected in such a manner, can one really have expected Congress to know about the Court's opinions that would support the foundation of any argument based on Congressional acquiescence? The short answer to this question is that the lower courts uniformly agreed prior to *Hollingsworth* that the predisposition issue was one that focused solely on the defendant's original state of mind.<sup>254</sup> The analysis of the Court's opinions is meant only to support the interpretation implicitly

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the Court has equated readiness with predisposition, and a defendant's eagerness to commit a crime when presented with an opportunity establishes his or her predisposition to commit the alleged offense. See *Hollingsworth* 27 F.3d at 1215. The Court seems to have confirmed this statement when it said that a defendant's prompt and affirmative response to a mere opportunity to commit a crime (with no further inducements) would likely result in the defendant being denied an instruction for entrapment. See *Jacobson v. United States*, 503 U.S. 540, 550 (1992). Therefore, when the Court uses the phrase "ready and willing," it is saying that the Government can demonstrate the defendant's predisposition in one of two ways: (1) with direct evidence of the defendant's willingness to commit the charged crime without government inducements, or (2) with circumstantial evidence of the defendant's willingness, specifically the defendant's ready response to the proposed opportunity. "In this sense, the defendant's preparation for the opportunity is no doubt relevant and probative on the issue of his predisposition. It is not, however, an independent element of the defense." *Hollingsworth*, 27 F.3d at 1215 (Ripple, J., dissenting) (citations omitted).

250. 411 U.S. 423 (1973).

251. See *id.* at 433.

252. *Id.* at 429 (emphasis added).

253. See Lori J. Rankin, Casenote, *Entrapment: A Defense for the Willing, Yet Unready, Criminal?*, 63 U. Cin. L. Rev. 1487, 1512 (1995).

254. See *supra* note 127 (citing cases).

reached by the lower courts prior to the Seventh Circuit's decision in *Hollingsworth*. An examination of the Court's entrapment jurisprudence demonstrates that the Court's traditional approach to the predisposition issue focused exclusively on the defendant's state of mind with no regard to evidence of his objective circumstances.<sup>255</sup> Prior to *Jacobson*, the lower courts understood this without dispute. Thus, to the extent Congress could have endorsed anything, it could have endorsed only a view of predisposition that focused generally on the state of mind of the defendant.

Finally, and more specifically, how should the prosecutor prove the existence of a predisposed state of mind? The best source of such evidence is the defendant's prior conduct, not speculative inferences drawn from a "present" mens rea. Thus, to prove predisposition, a prosecutor must include temporal, or dual, evidence of mens rea. When entrapment is raised, the prosecution should be required (and allowed) to demonstrate the prior conduct of the defendant that initiated the decision to target him and to then prove possession of the respective mens rea element at that time. In that sense, the induced crime is merely corroborative of prior similar conduct with the same mens rea. Further, the prosecution should be required to prove that the defendant responded positively to the first significant governmental inducement. In other words, the Government gets one bite at the apple with respect to inducement. What particularly upsets a court is the specter of repeated efforts by the Government to induce a crime. If a target is given the opportunity to commit a crime by government inducement but rejects that opportunity, continued inducements generally should cease. Such a rule would place greater pressure on the initial approach to a target by an informant and may limit wiring of witnesses to only the task of obtaining evidence of prior crimes.

Returning to the Lewinsky investigation, Lewinsky's preparation of the "talking points" memo and delivery of that memo to Linda Tripp suggested a corrupt motive and predisposition to obstruct justice prior to inducement. What Lewinsky subsequently said to Tripp at their wired meeting, therefore, was appropriate for prosecutorial focus (assuming the general appropriateness of prosecuting a coverup during a deposition in a civil case).

#### CONCLUSION

In a perfect world, Congress would step forward and resolve many of the problems surrounding the entrapment defense—problems that stem in large part from Congress's failure to take action on this issue during the twentieth century. This is not, however, a perfect world, and the courts will be forced to confront the entrapment issue more

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255. See *supra* Part II.

frequently in the future. Could the Supreme Court agree with Judge Posner? Perhaps, but to do so would not only distort the Court's own entrapment jurisprudence, but would also signal lower courts around the country to disregard the spirit of the Court's opinions and implement their policy preferences through thinly disguised "readings" of the Court's decisions that excuse criminal conduct.

The Court should provide more specific guidelines in order to clarify its opinion in *Jacobson*. If the Court reads *Jacobson* for what it is, and not for what some would like it to be, the Court will be led to a conclusion similar to that adopted by Justice Breyer in *Gendron*. For better or worse, the standard of predisposition in the federal courts focuses on the defendant's state of mind, and not on his or her objective circumstances, both initially, prior to inducement, and at the time of the induced crime itself. More particularly, when the crime consists of spoken words induced by a government agent, prosecutors should be directed to prove, and a jury to find, the relevant state of mind by evidence of the defendant's prior similar acts that justified the investigation and evidence that the defendant responded positively to the first significant government inducement.

*Notes & Observations*