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Presenting, Back From the [Almost] Dead, the Entrapment Defense

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I. THE CAST OF CHARACTERS

Thomas Tobias, Ralph Hubert ("Sonny") Barger, Richard Wayne Mummert, Kenneth Musslyn, and J. Wilton Hunt have much in common.

Tobias was convicted in Mobile, Alabama of conspiracy to manufacture and possess Phencyclidine (PCP).\(^1\) Actually, he wanted to manufacture cocaine but, with no prior background in such production, was unable to do so.\(^2\) An undercover drug enforcement officer, pretending to manage a chemical plant that had been advertised in *High Times*.

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\(^1\) United States v. Tobias, 662 F.2d 381, 384 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982).

\(^2\) Id. at 383.
Magazine, suggested to Tobias that he make PCP.\textsuperscript{3} The agent sent Tobias everything necessary to do so, and then spoke with Tobias more than a dozen times to discuss problems encountered in the manufacturing process.\textsuperscript{4} Tobias was sentenced to fifteen years in prison.\textsuperscript{5}

The "recognized leader of the Hells Angels," Sonny Barger was investigated over a long period of time.\textsuperscript{6} As part of the investigation, an FBI informant infiltrated the Anchorage, Alaska chapter of the Hells Angels.\textsuperscript{7} In response to the killing of two Hells Angels, allegedly by members of a rival group known as the Outlaws Motorcycle Club, Barger and others spoke of retaliation against the Outlaws.\textsuperscript{8} The government informant was an active participant in the discussions and encouraged Barger to travel to Alaska to talk further about retaliation. Moreover, the informant flew all over the country, at government expense, to meet with various members of the Hells Angels.\textsuperscript{9} As the court itself observed, "[t]he government did to an extent control the [retaliatory] scheme."\textsuperscript{10} The informant told Barger about a plan to blow up the Outlaws' clubhouse, and explained how an explosion would kill five or six people.\textsuperscript{11} Barger was pleased with the retaliation plan which developed.\textsuperscript{12} Subsequently, Barger was convicted in Louisville of conspiracy to violate explosives and firearms laws.\textsuperscript{13}

The situation involving Richard Wayne Mummert was an unusual one. He owned a Ford dealership at which an undercover agent secured a job.\textsuperscript{14} Mummert, who had difficult business problems, had been forced to relocate his dealership and needed $1.2 million for a new facility.\textsuperscript{15} He was unable to obtain such funds.\textsuperscript{16} The government agent informed Mummert that a loan for the $1.2 million could be arranged through the agent's father, who was supposed to be on the board of

\begin{thebibliography}{9}
\bibitem{3} Id.
\bibitem{4} Id. at 383-84.
\bibitem{5} Id. at 384.
\bibitem{7} Id.
\bibitem{8} Id.
\bibitem{9} Id.
\bibitem{10} Id. at 364.
\bibitem{11} Id. at 362.
\bibitem{12} Id.
\bibitem{13} Id. at 361.
\bibitem{14} United States v. Reynoso-Ulloa, 548 F.2d 1329, 1331 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978).
\bibitem{15} Id.
\bibitem{16} Id.
\end{thebibliography}
directors of a bank. The agent further informed Mummert that the money was "dirty," because no taxes had been paid on it. Mummert indicated he would "launder" the money through a friend's contacts in Mexico in connection with a heroin operation. Mummert, in the words of the government agent, "indicated initial reluctance to becoming involved in the heroin transaction" but then agreed to participate. After numerous meetings over several months with undercover government agents, Mummert was arrested and ultimately convicted in San Diego of distributing heroin and conspiring to do so.

Kenneth Musslyn faced a government operation strikingly similar to that involved in the Supreme Court's decision in Jacobson v. United States just a few years later. The investigation involving Musslyn took place over a period of more than five years. The Postal Service created an undercover operation to investigate illegal mailings of child pornography. Musslyn was sent an application by "Crusaders for Sexual Freedom," an organization created by the Postal Service. He filled it out and indicated interest in sexual material involving pre-teen children. Later a postal agent contacted Musslyn claiming she was a member of the organization and a collector of hard-to-find erotic photos and films; she told him she wanted to find someone with whom to trade. Correspondence between the two took place for more than a year. Finally, Musslyn met the agent at a bar in Kansas City, reiterated his interest, and agreed to correspond further with the agent. Three years after his initial application to the "Crusaders" was completed, Musslyn submitted an application to still another undercover postal

17. Id. at 1331-32.
18. Id. at 1332.
19. Id.
20. Id.
21. Id. at 1331-33.
24. See infra text accompanying notes 51-56.
25. Musslyn, 865 F.2d at 946.
26. Id. at 945.
27. Id.
28. Id. at 945-46.
29. Id. at 946.
30. Id.
31. Id. During the investigation, Musslyn entered a plea of guilty to charges arising out of an unrelated incident where he was photographed having oral sex with a 13-year-old girl. Id.
organization, the "American Hedonist Society." Finally, in response to a brochure offering photographs of children involved in sexually explicit conduct, Musslyn ordered illegal photographs and enclosed a check. Delivery of a parcel containing the photographs was made to Musslyn in Raytown, Missouri. Immediately thereafter, Musslyn was arrested and later convicted of unlawfully receiving child pornography.

In some ways the most interesting person of the bunch is J. Wilton Hunt who, at the time of his prosecution, was a district judge in the state of North Carolina. He was convicted under RICO for conspiring to engage in racketeering activities. His conviction resulted from a two-year undercover investigation of public corruption in Columbus County, North Carolina. It was directed against Hunt in response to a statement by a local criminal that he could bribe the judge. The efforts at bribery under the government’s supervision were unsuccessful, but the agents were introduced to another individual who claimed to be acquainted with Hunt. This second person then sought out Hunt. After a series of meetings, the judge agreed to accept $1500 a month to "protect" what was to be an illegal gambling operation. Initially, he took $1000 in cash from the government informer but stated that "he had never taken money before and found it difficult" to do so, and suggested "that the money be considered a ‘campaign contribution.’" Monthly payments were made over a period of several months.

These five men may not be instantly recognizable even to sophisticated judges and criminal law specialists. However, Joseph George Sherman and Keith Jacobson are quite well known to observers of the American criminal justice system. Sherman was at a doctor’s office being treated for narcotics addiction when he met Kalchinian, a

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32. Id.
33. Id.
34. Id.
35. Id. at 945.
37. Id. at 1079 (referring to a violation of 18 U.S.C. §§ 1962(d), 1963).
38. Id. at 1080.
39. Id.
40. Id.
41. Id.
42. Id. at 1081.
43. Id.
44. Id. at 1086.
government informer. Several accidental meetings followed and their conversations moved to a discussion of mutual experiences and problems in seeking to overcome their addictions. Kalchinian asked Sherman if he knew of a good source of narcotics and pleaded with Sherman on several occasions to supply him with drugs because he was not reacting positively to treatment. Sherman consistently tried to avoid responding, but he finally agreed to get narcotics for Kalchinian. Later, government agents observed Sherman give narcotics to Kalchinian on several occasions. Sherman was convicted in federal court of the sale of narcotics.

As with Musslyn, Jacobson was convicted of receiving through the mails illegal materials depicting minors engaged in sexually explicit conduct. He, too, was the subject of an intense postal service investigation that lasted over two years. Finally, as with Musslyn, the government-created organizations wrote Jacobson on many occasions to probe his interest in child pornography. The names of two of the front organizations in this case were the ubiquitous "American Hedonist Society" and the "Heartland Institute for a New Tomorrow." During the investigation, Jacobson was contacted numerous times by agents purportedly to determine his interest in protecting sexual freedom. In one letter to Jacobson the government officer raised some provocative points:

"As many of you know, much hysterical nonsense has appeared in the American media concerning 'pornography' and what must be done to stop it from coming across your borders. This brief letter does not allow us to give much comments; however, why is your government spending

46. Id.
47. Id.
48. Id.
49. Id.
50. Id. at 370. Sherman was convicted under 21 U.S.C. § 174 (1952), the predecessor of the current federal narcotics statutes.
52. Id. at 543-47.
53. Id. at 543-45.
54. Id. at 543-44.
55. Id. at 544-45.
millions of dollars to exercise international censorship while
tons of drugs, which makes yours the world’s most crime
ridden country are passed through easily.”

Seven individuals, each with a different story. Yet, at the outset, I
mentioned that they all have much in common. What could that possibly
be? All were convicted of different crimes, by different courts, in
different locations, and all were sentenced to different terms of
imprisonment. These cases all share important characteristics. First,
these cases actually existed. Federal law enforcement officers truly did
use resources, time, and energy to target these prosecutions and set up
long-term sting operations in order to achieve convictions of individuals,
some of whom were not already engaged in criminal activity. Second,
the defendant in each of these cases raised a claim of entrapment. Third,
these cases demonstrate the difficulty of prevailing when
entrainment is raised as a defense. Except for Sherman and Jacobson, the
defendants lost on their entrapment defenses.

Perhaps it is not overly surprising that between 1977 and 1991 these
entrainment arguments proved unsuccessful. In each conviction, the
defense was rejected because the defendant failed the prevailing
subjective test for entrapment. Each was found to have been predisposed
toward criminal activity. The Tobias court observed:

Tobias responded to a simple advertisement offering the
over-the-counter sale of chemicals which could be pur-
chased without any difficulty in chemical houses in Mobile,
Alabama. This advertisement served only to provide one so

56. Id. at 546 (quoting letter to Jacobson).
57. Jacobson, 503 U.S. at 542; Sherman, 356 U.S. at 370-71; Barger, 931 F.2d at 365-66;
Musslyn, 865 F.2d at 946 (referring to the “Outrageous Government Conduct” defense); Hunt,
749 F.2d at 1080; Tobias, 662 F.2d at 384; Reynoso-Ulloa, 548 F.2d at 1334.
58. Jacobson, 503 U.S. at 554 (reversing Jacobson’s conviction because the government
failed to “adduce evidence to support the jury verdict that [Jacobson] was predisposed,
independent of the Government’s acts”); Sherman, 356 U.S. at 373 (finding entrapment as a
matter of law); Barger, 931 F.2d at 367 (rejecting Barger’s “argument that his conviction for
conspiracy should be reversed because of government entrapment”); Musslyn, 865 F.2d at 947
(finding the government’s conduct insufficiently outrageous or fundamentally unfair as to bar
Musslyn’s prosecution because Musslyn was clearly predisposed to collect child pornography
and engage in sexual acts with children); Hunt, 749 F.2d at 1087 (finding the evidence
“sufficient for the jury to find the requisite predisposition and to reject the entrapment defense”);
Tobias, 662 F.2d at 384-85 (affirming district court’s refusal to grant a judgment of acquittal
based on an entrapment defense); Reynoso-Ulloa, 548 F.2d at 1338 (finding Mummert was not
entrapped as a matter of law).
disposed the opportunity to obtain the necessary precursors and equipment to manufacture controlled substances. Tobias seized this opportunity by writing the supply company for "more information" and telephoning the supply company on many occasions to place and check on his order. The DEA did nothing else to solicit Tobias's business. 59

Barger, as acknowledged head of the Hells Angels, 60 was hardly an innocent. He "discussed retaliation many times with various members of the Hells Angels . . . [and he] evidenced no reluctance to become involved in the conspiracy . . . [and] expressed interest and pleasure in [the plan's] retaliatory nature." 61 Mummert, too, was not a hesitant catch, as he "was willing to do almost anything to obtain the [$1.2 million]." 62 Musslyn, in the words of the appeals court, "was clearly predisposed to order child pornography," 63 and the learned judge, defendant Hunt, "never demonstrated any desire to withdraw from the protection scheme until his name had been publicly linked to criminal activities several months later." 64

Sherman and Jacobson also lost at the trial level. 65 However, they became prominent figures because their appeals resulted in the two most significant United States Supreme Court decisions on entrapment law, Sherman v. United States 66 and United States v. Jacobson. 67

After Sherman was decided in 1958, there had been great hope for the entrapment defense. For more than thirty years, however, it seemed to be dying, 68 especially in the federal courts. 69 In 1992, the Jacobson decision resurrected the defense. To be sure, the defense is now so vibrant that the outcomes for Tobias, Barger, Mummert, Musslyn, and Hunt might well be different if they were charged today.

59. Tobias, 662 F.2d at 385.
60. Barger, 931 F.2d at 361.
61. Id. at 367.
62. Reynoso-Ulloa, 548 F.2d at 1338.
63. Musslyn, 865 F.2d at 946.
64. Hunt, 749 F.2d at 1086. The court went on to explain that "more visible qualms could have been expected from a public servant of reasonable rectitude who had been led astray." Id.
69. The defense fared better in the state courts as a general matter, particularly in those states which adopted the so-called objective test. See infra notes 71-76 and accompanying text.
But, we move too quickly. The goal here is to determine the current viability of the defense, and to predict where the defense is likely to move in light of judges’ responses to the Supreme Court’s broad opinion in *Jacobson*. It is appropriate to begin with a brief discussion of some key non-issues, so that the stage can properly be set for the defining matter, the great change which is being seen in the application of the entrapment defense.

II. NON-ISSUES IN ENTRAPMENT LAW

Many questions surround the entrapment defense. Some of these questions, while important, are not germane to the subject matter of this Article. The first is the impressive experimentation with the defense by a number of states.70 Some states utilize an objective analysis which focuses exclusively on government behavior, not looking at all to the predisposition of the defendant.71 Others use a similar test, but allow some subjective evidence with regard to the defendant’s own situation72 or even evidence as to her state of mind.73 Still others combine the subjective and objective analyses by judicial determination,74 by

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70. Both federal and state courts have repeatedly emphasized that the entrapment defense is not constitutionally based, so states and Congress are free to adopt their own versions of the defense. See, e.g., United States v. Russell, 411 U.S. 423, 433 (1973).

71. For a good discussion of the origins of the objective test and the manner in which it differs from the subjective approach, see Commonwealth v. Lucci, 662 A.2d 1, 1-4 (Pa. 1995) (tracing the objective test and its emphasis from its origins in *Sherman* to its current codification in Pennsylvania statutory law). California is one of the leading jurisdictions in formulating this so-called objective test. Its standard asks what the effect of the government inducement “would have [been] on a normally law-abiding person situated in the circumstances of the case at hand.” People v. Barraza, 591 P.2d 947, 955 (Cal. 1979). As stated by the Hawaii Supreme Court in State v. Agrabante, 830 P.2d 492, 499 (Haw. 1992) (quoting State v. Anderson, 572 P.2d 159, 162 (Haw. 1977)), the “dispositive” question is whether the police action “was so extreme that it created a substantial risk that persons not ready to commit the offense alleged [being] persuaded or induced to commit it.”

72. People v. Juillet, 475 N.W.2d 786, 793 (Mich. 1991) (stating that the “circumstances of the particular defendant may be considered by the trial court in analyzing the ready and willing component of the objective entrapment test”).


74. In New Mexico the judge makes an initial determination and if the judge concludes that reasonable minds could differ as to whether there was misconduct on the part of state agents, exceeding standards of proper investigation, then the question is sent to the jury. See State v. Sheetz, 825 P.2d 614, 619 (N.M. Ct. App. 1991). The Minnesota procedure is unique. The defendant there can choose to have the entrapment defense resolved by the judge at a pretrial hearing or by the jury at trial. See State v. Grilli, 230 N.W.2d 445, 455 (Minn. 1975).
statute, or by a blend of state constitutional principles and statutory enactments. Indeed, even in jurisdictions where courts follow the lead of the United States Supreme Court in the entrapment area, some interesting developments have occurred. But exploring the various state applications of the entrapment defense goes beyond the issues being discussed here.

This Article also does not review the fundamental debate over the two entrapment tests. The first test, as mentioned previously, is referred to as the objective analysis. It is utilized in some form by about a third of the states, and is strongly supported by commentators and study commissions. The objective test looks to law enforcement behavior in determining whether the courts should intervene to limit inappropriate governmental behavior. The key question is whether the official action was likely to cause an average, law abiding citizen to commit a crime.

The second test, adopted by the Supreme Court, rejects the objective view of entrapment law. Instead, its subjective analysis traditionally has

75. For a discussion of the combination as passed by the New Jersey legislature, see State v. Rockholt, 476 A.2d 1236 (N.J. 1984).
76. See Munoz v. State, 629 So. 2d 90, 91 (Fla. 1993) (finding that while a subsequent statutorily-adopted subjective standard eliminated a judicially-adopted objective standard, the legislature could not prohibit the judiciary from objectively reviewing the issue of entrapment to the extent that such a review involved issues of due process under the Florida Constitution).
77. Mississippi follows the subjective test but its courts have held a defendant can show entrapment as a matter of law if she demonstrates that the government both supplied illegal substances and then bought them back from her. See Bosarge v. State, 594 So. 2d 1143, 1146 (Miss. 1991) (stating that this type of activity is a form of official misconduct which must be condemned and that, absent a substantial and overriding showing of the defendant’s predisposition for drug trafficking,” the defendant must be acquitted). The United States Supreme Court in Hampton v. United States, 425 U.S. 484 (1976) reached the opposite conclusion.
78. See supra text accompanying note 71.
80. See, e.g., Agrabante, 830 P.2d at 449.
81. See, e.g., Barraza, 591 P.2d at 955.
focused almost entirely on the defendant’s predisposition to commit the crime.\textsuperscript{82} Debate concerning the two tests is over at the Supreme Court level.\textsuperscript{83} The last proponent of the objective test, Justice Brennan, conceded the point in 1988.\textsuperscript{84} No member of the Court today expressly supports the objective view.\textsuperscript{85}

Finally, this Article will not consider the issue of due process violations stemming from government overreaching. A court’s displeasure with the extent of government involvement in the creation and development of crime can be dispositive,\textsuperscript{86} still the due process issue is decidedly distinct from the underlying entrapment question.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{82} See, e.g., \textit{Hampton}, 425 U.S. at 488-89 (quoting United States v. Russell, 411 U.S. 423, 429 (1973)).
\item \textsuperscript{83} The debate was furious over an extended period of time. See, for instance, the exchanges between Chief Justice Hughes and Justice Roberts in \textit{Sorrells} v. United States, 287 U.S. 435 (1932); Chief Justice Warren and Justice Frankfurter in \textit{Sherman}, 356 U.S. at 369; Justices Rehnquist and Stewart in United States v. Russell, 411 U.S. 423 (1973); and Justices Rehnquist and Brennan in \textit{Hampton}, 425 U.S. at 484.
\item \textsuperscript{84} In Mathews v. United States, 485 U.S. 58, 66-67 (1988), Justice Brennan stated the following:
\begin{quote}
I join the Court’s opinion. I write separately only because I have previously joined or written four opinions dissenting from this Court’s holdings that the defendant’s predisposition is relevant to the entrapment defense. Although some governmental misconduct might be sufficiently egregious to violate due process, my differences with the Court have been based on statutory interpretation and federal common law, not on the Constitution. Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government’s conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to \textit{stare decisis}, and today join the judgment and reasoning of the Court.
\end{quote}
\textit{Id.} (Brennan, J., concurring) (citations omitted).
\item \textsuperscript{85} \textit{Jacobson} marked the first time this century that the Supreme Court considered the issue of entrapment without mentioning the debate over the two tests.
\item \textsuperscript{87} As noted by the Court of Appeals for the Second Circuit:
\begin{quote}
[The due process claim] differs from entrapment: whereas the entrapment defense focuses on the state of mind of the defendant as it relates to his predisposition to commit the offense charged, the defense of “outrageous government conduct” recognizes that “extreme cases may arise where the government’s conduct is so outrageous as to violate due process, even though the evidence permitted the jury to find that the defendant was predisposed.”
\end{quote}
\end{itemize}
While all of these issues are important, the most compelling today is the application of the majority's subjective standard for the entrapment defendant. The key inquiry is into the manner in which a defendant's "predisposition" to commit crimes is to be decided and by whom. The fundamental consideration, usually made as a question of fact by the jury, is whether "prior to the initial contact by government agents" the defendant was disposed to commit a crime. In addition, it must be decided whether the government induced the defendant by creating "a substantial risk that an undisposed person or otherwise law-abiding citizen [committed] the offense."  

The central determination of predisposition may appear far easier to make than it actually is. Individuals can be involved with complex transactions taking place over lengthy periods of time. The process is truly a tough one because the focus is on the defendant's state of mind at a particular time. Moreover, triers of fact may be strongly influenced by looking to the type of person recruited by the government in order to complete the transaction. The dilemma was well stated by one court: "It is simply naive to suppose that public officials, or other defendants, can be neatly divided between the pure of heart and those with a 'criminal' outlook." But it is this determination of the defendant's subjective willingness to commit a crime that must necessarily occupy the courts in applying the predisposition test for entrapment.

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88. The court may find entrapment as a matter of law "'only when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act.' " United States v. Fadel, 844 F.2d 1425, 1434 (10th Cir. 1988) (quoting United States v. Gurule, 522 F.2d 20, 23 (10th Cir. 1975)). As stated in United States v. Lorenzo, 43 F.3d 1303, 1305 (9th Cir. 1995) (internal citation omitted) ("Ordinarily, the question of entrapment is for the jury to resolve. To find entrapment as a matter of law, there must be undisputed evidence establishing both that defendant was induced to commit the crime and that he lacked the predisposition to do so."). See also United States v. Davis, 36 F.3d 1424, 1430 (9th Cir. 1994), cert. denied, 115 S. Ct. 1147 (1995); United States v. Mendoza-Salgado, 964 F.2d 993, 1001 (10th Cir. 1992).

89. United States v. Lessard, 17 F.3d 303, 305 (9th Cir. 1994) (quoting United States v. Mkhsian, 5 F.3d 1306, 1310 (9th Cir. 1993)).

90. United States v. Van Slyke, 976 F.2d 1159, 1162 (8th Cir. 1992) (quoting United States v. Stanton, 973 F.2d 608, 609 (8th Cir. 1992)).

91. Hunt, 749 F.2d at 1085 n.9.
III. THE SUPREME COURT TO THE RESCUE

Since World War II, several entrapment cases have been decided by the Supreme Court: two are significant here.92 The two, Sherman and Jacobson as discussed previously, are similar in several ways. In each case, the government behavior directed at the individual defendant was persistent and extended.93 The Court stated in both cases that the entrapment issue is normally one of fact for the jury, but ultimately found, as a matter of law, that entrapment had occurred.94 In both cases, the finding of entrapment resulted in acquittal for the defendants.95 Finally, both opinions initially emphasized the elements of the entrapment defense, looking to inducement by the government and predisposition by the defendant, but ultimately shifted to broad condemnation of the inappropriate actions of the government.96 The language in each opinion is harsh and the eventual impact is substantial.

Chief Justice Warren in Sherman initially discussed the state of mind inquiry for the entrapment defense:

To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal... On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry

92. Several other cases decided by the Supreme Court during this period were certainly of note, though they offer little guidance regarding how to reach a conclusion as to an individual's disposition to commit a particular crime. In Hampton and Russell, the Court rejected the view that entrapment as a matter of law could occur solely because government agents provided ingredients for the manufacture of narcotics. See Hampton, 425 U.S. at 490; Russell, 411 U.S. at 434-35. In Hampton, government agents supplied the defendant with narcotics which they later purchased. Hampton, 425 U.S. at 486-87. In both cases the Court emphasized that the major consideration is the defendant's state of mind: Was he disposed to commit the crime prior to the government's solicitation? Id. at 490; Russell, 411 U.S. at 434-35. The other entrapment case worthy of mention is Mathews, where the Court simply brought the entrapment doctrine into accord with the law in other civil and criminal areas by holding that inconsistent defenses, including entrapment, could be raised. Mathews, 485 U.S. at 65-66.

95. Jacobson, 503 U.S. at 554; Sherman, 356 U.S. at 373.
96. Jacobson, 503 U.S. at 553-54; Sherman, 356 U.S. at 373-76. Jacobson, of course, also is important because it is the first significant case where no Justices argued the merits of the objective test for entrapment. See supra text accompanying notes 83-85.
into his own conduct and predisposition" as bearing on his claim of innocence. 97

Justice White’s language in Jacobson is of similar import:

[The government agent] may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate “sting” operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant’s predisposition. 98

In neither case, however, did the majority opinion deal solely with a narrow application of the rules regarding the government’s inducement and the defendant’s predisposition. Chief Justice Warren in Sherman strongly rebuked the “setup” by the drug officers:

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this. 99

Consider Justice White’s words of condemnation for the Postal Service’s actions in bringing Jacobson into the criminal justice system:

Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner—who must be presumed to know the law—had promptly availed himself of this criminal opportu-

nity, it is unlikely that his entrapment defense would have warranted a jury instruction.

But that is not what happened here. By 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.

... Law enforcement officials go too far when they "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 100

The central issue is clearly the defendant's state of mind. Yet, both these quotes establish that no decision as to predisposition can be made without looking fully at the extent of government involvement in the criminal enterprise—its inducement activities. The shift in emphasis from an exclusive review of the evidence regarding the defendant's state of mind to the nature of the improper government inducement is neither shielded nor subtle. The Court in both cases reiterated its support for the subjective, predisposition test for entrapment. 101 Still, it applied this test in context, analyzing the nature of the defendant's mental state by exploring the scope of the government inducement. 102 Thus, in both cases, the Court concluded that entrapment had been shown as a matter of law. 103

This conclusion is reached not because evidence of predisposition was wholly absent—it was present in both cases. 104 Rather, the government involvement in the creation of crime was simply too great and the evidence of predisposition too weak. 105 The message from Sherman

100. Jacobson, 503 U.S. at 550, 553 (quoting Sorrells, 287 U.S. at 442) (emphasis added by Jacobson Court) (internal citation omitted).
102. Jacobson, 503 U.S. at 553; Sherman, 356 U.S. at 373-76.
103. Jacobson, 503 U.S. at 553-54; Sherman, 356 U.S. at 373.
104. See Jacobson, 503 U.S. at 550-51 (noting that Jacobson had become predisposed to break the law); Sherman, 356 U.S. at 375-76 (observing that Sherman had a record of two past narcotics convictions, one for sales, the other for possession).
105. See Jacobson, 503 U.S. at 550 (remarking that while Jacobson had become predisposed to breaking the law, this predisposition was largely the product of government involvement); Sherman, 356 U.S. at 375-76 (regarding Sherman's two prior narcotics convictions as insufficient to prove he had a readiness to sell narcotics at the time of the investigation, especially in light of the government inducement). In fairness, a review of the government involvement has always been present. The entrapment defense has consistently been viewed as requiring proof of two elements: lack of predisposition and government inducement. However,
and *Jacobson* rings out clearly: judges are to scrutinize carefully long-
term, intense government operations in order to decide if entrapment as
a matter of law has occurred. That is, the court must answer the
question, was it the government which truly designed and nurtured the
criminal activity? This message has been well understood by judges
throughout the United States.

IV. APPLYING THE DOCTRINE

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.106

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106. In *Sherman*, the analysis of governmental conduct was not at issue. Neither was it
ignored. The concurring Justices, led by Felix Frankfurter, argued that the Court should have
explicitly found entrapment because of the government’s overreaching, under an objective theory
of the defense. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring). In *Jacobson*, on the other
hand, the dissenters, in an opinion by Justice O’Connor, recognized the change in emphasis
which was taking place, and complained vociferously. They were particularly distressed with the
requirement that the prosecution’s predisposition evidence relate to the time after government
agents initially contacted the defendant, not simply after they solicited him to commit the crime.
*Jacobson*, 503 U.S. at 557-58 (O’Connor J., dissenting). In *Jacobson*, of course, the distinction
was crucial. The solicitation took place 2 1/2 years after the initial contact and after tremendous
pressure by government agents. *Id*. at 550. The dissenters also expressed concern that the
majority’s view “has the potential to be misread by lower courts as well as criminal investigators
as requiring that the Government must have sufficient evidence of a defendant’s predisposition
before it ever seeks to contact him.” *Id*. at 557 (O’Connor, J., dissenting) (emphasis added by
J. O’Connor). On this latter point, however, Justice O’Connor was incorrect, at least insofar as
later cases have interpreted *Jacobson*. Not a single opinion can be located which holds that, in
light of *Jacobson*, the prosecution needs to show some sort of individualized suspicion prior to
engaging in an undercover operation.

As stated in United States v. Kussmaul, 987 F.2d 345, 349 (6th Cir. 1993): “[T]he
Government does not need to establish a reasonable suspicion of illegal activity before instituting
a sting operation, since such a requirement would obviate the need to have such operations.”
This holding is well accepted, but its rationale is somewhat curious. Reasonable suspicion is a
low standard, hardly sufficient to satisfy the warrant requirement of probable cause, or the trial
mandate of proof beyond a reasonable doubt. Law enforcement officers with reasonable
suspicion could choose to continue an investigation in order to obtain a warrant or present strong
evidence for trial. And, the investigation might well entail a sting operation. Still, the court’s
ultimate conclusion remains virtually unchallenged. See United States v. Albejeris, 28 F.3d 97,
There is now a growing concern by judges throughout the country that undue involvement by the government may constitute entrapment even where the defendant appeared willing to commit the crime. Hence, one may conclude that cases such as those mentioned at the start of this Article might well come to a different result today than in earlier times. Clearly, courts today are far more willing than ever before to find entrapment, as a matter of fact or as a matter of law. This finding may even be made in cases in which the defendant reacts with relative eagerness to the government contact. The key issue today increasingly looks to whether the government’s actions constituted a long-term,

99 (11th Cir. 1994) (stating that there is no requirement that the government have evidence of predisposition or wrongdoing before initiating an investigation); United States v. Harvey, 991 F.2d 981, 992 (2d Cir. 1993) (noting that the government is not required to show it had reasonable cause prior to targeting a suspect for criminal investigation).

107. Which is not to suggest either that prior to Jacobson there had been no important cases finding entrapment as a matter of law in favor of the defendant, or that after Jacobson the courts invariably found entrapment where there was substantial government involvement. The legal terrain is not nearly so smooth. Here, for instance, are strong rulings in favor of the defendant, prior to Jacobson: United States v. Dion, 762 F.2d 674, 686 (8th Cir. 1985) (“The important point is not that this conduct by the government agents was necessarily outrageous, but that [defendant] was not merely given an opportunity to take or kill an eagle but was encouraged to do so by the agents’ repeated direct and indirect solicitations over a nearly two-year period.”) (footnote omitted), rev’d in part on other grounds by United States v. Dion, 476 U.S. 734 (1986); United States v. Lard, 734 F.2d 1290, 1294 (8th Cir. 1984) (before the government’s pursuit of the defendant, no showing that he had engaged in any prior criminal conduct and had no record of making or dealing in any firearms—let alone pipe bombs or similar such ‘destructive-device’ firearms”); United States v. Borum, 584 F.2d 424, 429 (D.C. Cir. 1978) (finding the Supreme Court made clear the materiality “of the expressed reluctance of defendant, and of the fact that the defendant capitulates or accedes only in the context of repeated solicitations by law enforcement agents”).

The following post-Jacobson cases were resolved against the defendant: United States v. Gonzales, 58 F.3d 506, 513 (10th Cir. 1995) (holding an Internal Revenue Service agent did not, by offering a compromise containing a misstatement, entrap defendant into committing the offense of attempting to evade taxes because defendant did not have to sign the document); United States v. Kummer, 15 F.3d 1455, 1459 (8th Cir. 1994) (affirming drug conviction based on evidence of defendant’s “apparent previous involvement in drug trafficking and his willingness to purchase the cocaine from the informants absent any prodding or inducement on the part of the police”); Kussmaul, 987 F.2d at 349 (finding that government’s “sting operation did not exhibit the persistent and overzealous Government pursuit of a reluctant and unresponsive individual over an extended period of time which so offended the Jacobson Court”). For a sharp difference of opinion regarding the application of Jacobson, see United States v. Pardue, 983 F.2d 835, 842 (8th Cir. 1993) (reversing a district court finding of entrapment because the Eighth Circuit found the government’s actions to be permissible under Jacobson and did not constitute outrageous conduct), cert. denied, 113 S. Ct. 3043 (1993).

108. See infra notes 203-12 and accompanying text.
overreaching operation that could overwhelm even an unwilling defendant.

Almost twenty years ago, Judge McGowan of the District of Columbia Circuit recognized that inquiry into government behavior was crucial in many entrapment cases in order to decide if the subjective, predisposition test had been met:

Clearly, one way of proving predisposition is to show that the defendant responded affirmatively to less than compelling inducement by the government agent. The limited character of the participation in the crime by the agent may convince the jury of predisposition on the part of the defendant. If, on the other hand, the accused did not respond affirmatively until after substantial pressure or threats by the government agent, then the prosecution generally must introduce additional evidence in order to convince the jury of predisposition.\(^\text{109}\)

The point was made succinctly in one of the ABSCAM cases, *United States v. Jannotti*:\(^\text{110}\) "The greater the inducement, the heavier the government's burden of proving predisposition."\(^\text{111}\)

The best illustration of this shift toward closer scrutiny of government inducement in determining predisposition is the Seventh Circuit's *en banc* opinion in *United States v. Hollingsworth*.\(^\text{112}\) In *Hollingsworth*, a dentist and a farmer were convicted of a money laundering scheme that had been hatched as the result of a government operation.\(^\text{113}\) The two had originally planned to become successful investment bankers and created a Virgin Islands corporation to conduct international banking, but the business was a failure.\(^\text{114}\) Desperate for clients, they began placing advertisements in general circulation publications.\(^\text{115}\) A United States customs agent responded to an advertisement in *USA Today* and then began a process of attempting to interest the dentist and the farmer.

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\(^{111}\) *Id.* at 619-20 (Aldisert, J., dissenting) (citing United States v. Watson, 489 F.2d 504, 511 (3d Cir. 1973)).

\(^{112}\) 27 F.3d 1196 (7th Cir. 1994) (*en banc*).

\(^{113}\) *Id.* at 1198.

\(^{114}\) *Id.* at 1200.

\(^{115}\) *Id.* (the advertisement offered to sell an unused foreign banking license).
in using the lawful business entity for illegal money laundering. After more than a year of various transactions between the parties, the two bankers were arrested for laundering cash given to them by the agent.

While the two were amateurs in the finance world, they were extremely anxious to turn a handsome profit and they responded with a singular lack of resistance to the agent’s plan to use the business to launder funds illegally. As stated by the dissenting opinion:

It is evident from the facts presented at trial that the defendants were quite well versed in how to launder money and expressed no reluctance at doing so. As the deal unfolded and additional details became known... [the defendants] proceeded full-speed ahead expressing an interest in laundering larger amounts of cash... The defendants’ actions are not those of an “unwary innocent” but rather those of a [sic] wary criminal.

The dissenters, though, ignore a critical fact. Prior to his contact with the defendants, the customs agent had no basis to believe these two individuals had previously engaged in illegal conduct or were seeking to do so. Indeed, the USA Today notice ad was apparently for lawful services. The agent contacted them, though, because he “assumed that someone who wanted to sell [an unused foreign banking license] would possibly be interested in money laundering.”

Judge Posner, writing for the majority, relied heavily on the Supreme Court’s decision in Jacobson and found that the defendants had been entrapped as a matter of law. Under Jacobson, it was not enough for the government to show merely that the defendants were willing to make money unlawfully as a result of the government’s instigation.

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116. Id. at 1200-01.
117. Id. at 1201.
118. The opinion referred to them as “tyros.” Id. at 1203.
119. While the two defendants were willing to engage in the operation, there was no evidence that before the involvement of the customs agent that either had contemplated engaging in such illegal behavior. Id. at 1202.
120. Id. at 1210 (Coffey, J., dissenting).
121. See id. at 1201.
122. Id. at 1200.
123. Id. at 1198-1205.
124. Id. at 1199 (“The defendants’ willingness to commit the crimes to which the government invited them cannot be decisive.”). The court was not alone in its view that Jacobson required a closer, and altered, analysis. Other circuit courts had previously referred to
The issue was whether the defendants would have engaged in such improper behavior without the agent's inducement. Judge Posner explained:

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; only then does a sting or other arranged crime take a dangerous person out of circulation.

The majority found entrapment as a matter of law because no showing was made that the dentist and the farmer had the practical knowledge or background, apart from a willingness, to commit a money laundering crime. The dissenters rejected this additional element for the entrapment defense, which would require an ability to perform the illegal act without government assistance. For them, the government had prevailed against the entrapment defense because it established that the defendants were predisposed to commit the crime. They were relatively eager participants in the agent's laundering plan.

The majority, however, was not moved by the eagerness of these two novices. Instead, the real concern was whether this type of crime would

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125. Id. at 1200.
126. Id.
127. Id. at 1202.
128. Id. at 1214 (Ripple, J., dissenting); id. at 1211-12 (Easterbrook, J., dissenting).
129. Id. at 1210 (Coffey, J., dissenting); id. at 1212 (Easterbrook, J., dissenting).
130. The complaint of the dissenters was that the majority gave no explanation why a person "who fully desires to break the law and is entirely willing to do what needs to be done to accomplish a criminal objective ought be excused from criminal liability simply because, for whatever reason, he does not have his act together when afforded an opportunity by an undercover agent." Id. at 1216 (Ripple, J., dissenting). In exasperation, the dissenting judges lamented that the government now "must also demonstrate that the defendant has sufficient aptitude and equipment to commit the crime and thus poses an immediate danger to society." Id. at 1217 (Ripple, J., dissenting). In fairness, the majority did not require the government to prove that the defendant poses an immediate danger, only that he pose some danger. Id. at 1200, 1203.
have been committed without government involvement.\footnote{\textit{Id.} at 1200, 1202.} No evidence was offered to show such a likely offense occurring.

Obviously [the defendants] were capable of the act. All that was involved in the act was wiring money to a bank account designated by the government agent. Anyone can wire money. But to get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. [The defendants] had none. . . . Even if they had wanted to go into money laundering before they met [the customs agent]—and there is no evidence that they did—the likelihood that [the defendants] could have done so was remote. They were objectively harmless.\footnote{\textit{Id.} at 1202.}

The Seventh Circuit ruled that the defense had proven entrapment because the prosecution failed to present strong evidence that the defendants would have gone forward on their own.\footnote{\textit{Id.} at 1202.} While entrapment is normally a question for the jury, it can be a matter of law when the evidence is strong and demonstrates "conclusively and unmistakably that an otherwise innocent person was induced to commit the

\textit{Id.} at 1202.

\textit{Id.} at 1202. In a somewhat similar rebuke of the prosecution's case, the Appellate Court of Illinois in People v. Karraker, 633 N.E.2d 1250, 1259 (Ill. App. Ct. 1994), reversed the conviction of the defendant for unlawfully possessing a weapon after conviction of a felony. Again drawing the distinction between willingness to commit a crime and the likely commission, the court noted that there had been no showing that the defendant was on the verge of committing the crime without the agent's involvement. \textit{Id.} The court duly chastised the government.

\textit{Id.} (quoting \textit{Sherman}, 356 U.S. at 383 (Frankfurter, J., concurring)).

\textit{Hollingsworth}, 27 F.3d at 1202.
act.' 134 This standard was the basis for the decision in Hollingsworth. 135

The majority opinion in Jacobson has encouraged other courts to consider carefully the government's evidence regarding predisposition. As a result, many courts have exhibited a willingness, rarely seen before, to find entrapment as a matter of law where government involvement is extensive. 136 Similarly, other courts also have looked carefully at government inducement in analyzing predisposition. Such a review is not simply to determine whether the defendant was a willing or even enthusiastic participant. Rather, the issue has become whether, absent governmental involvement, the defendant truly would have committed the criminal act. Indeed, cases from other federal circuits make the point with force. 137

134. United States v. Madrigal, 43 F.3d 1367, 1369 (10th Cir. 1994) (quoting Fadal, 844 F.2d at 1434). For a good discussion of entrapment as a matter of law, see United States v. Theodosopoulos, 48 F.3d 1438, 1444-47 (7th Cir. 1995). Here, the Seventh Circuit reversed the trial judge's finding of entrapment as a matter of law. Id.

135. See Hollingsworth, 27 F.3d at 1199 (explaining that a defendant "if left to his own devices" would "never run afoul of the law," should be entitled to acquittal) (quoting Jacobson, 503 U.S. at 553-54).

136. For a discussion of this willingness to find entrapment as a matter of law on both the state and federal levels, see infra notes 137-54 and accompanying text.

137. State judges, too, have begun in-depth evidentiary reviews to decide how dangerous individuals truly are, absent government inducement. The experience in Florida is especially illuminating. The line of cases begins with Munoz v. State, 629 So. 2d 90, 101 (Fla. 1993), where the Florida Supreme Court found entrapment as a matter of law because there was "no evidence whatsoever of predisposition on Munoz's part prior to and independent of the government inducement." See also State v. Finno, 643 So. 2d 1166, 1169 (Fla. 4th DCA 1994) (stating "[t]hat the defendant may philosophically or theoretically think that some act should not be criminal cannot amount to predisposition to commit the crime"); Beattie v. State, 636 So. 2d 744, 746 (Fla. 2d DCA 1993) (finding that in the absence of any predisposition, defendant was entrapped into committing the offense of possession of child pornography where defendant responded to an advertisement placed by U.S. Customs, engaged in an exchange of ten letters with an undercover customs officer, and met with the officer to purchase a child pornography videotape); State v. Howell, 629 So. 2d 213, 215 (Fla. 2d DCA 1993) (where the court explained: "In spite of that which may have been taking place in other pawn shops in Pasco County, law enforcement had no independent information prior to the expansive sting operation that Howell or his business ever knowingly purchased stolen property. There is no evidence in this record to indicate that [the defendant] was predisposed to commit the charged offense, and no one had tipped the sheriff's office that [the defendant] would knowingly negotiate for stolen merchandise.")]. The point is made most powerfully in State v. Ramos, 632 So. 2d 1078, 1079 (Fla. 3d DCA 1994), where the court wrote:

[T]he confidential informant had to contact [the defendant] approximately fifteen or sixteen times in order to persuade him to commit the offense. Moreover, the trial
One example is *United States v. Sandoval*,\textsuperscript{138} in which the court made clear that willingness on the part of the defendant to commit the solicited crime is not enough to prove predisposition.\textsuperscript{139} "*Jacobson* clarified the boundaries of such substituted proof, rejecting it where significant and persistent government encouragement was required to induce the crime."\textsuperscript{140} The court compared the facts to those in *Jacobson*:

The facts of the instant case involve government conduct every bit as troubling as that described in *Jacobson*. . . . [I]t is clear that the IRS initiated the bribery scheme. . . . It was only after Hernandez' persistent requests for a personal benefit and the rejection of a reward for information that Sandavol considered offering more . . . . We are persuaded that the government originated the bribery scheme, implanted it in Sandavol's mind, and induced him to cooperate.\textsuperscript{141}

In *Sandoval*, the court concluded that the degree of pressure applied by the government was too great,\textsuperscript{142} and found entrapment as a matter of law.

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\textsuperscript{138} 20 F.3d 134 (5th Cir. 1994).
\textsuperscript{139} See id. at 138.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 137.
\textsuperscript{142} Id. at 138. The court stated:

The government distinguishes *Jacobson*, arguing that the government pursued *Jacobson* for 26 months while *Sandoval* agreed to bribe Hernandez after only one meeting. The time involved is less important than the degree of pressure applied. *Jacobson* received seven or eight mailings from the government over the course of 26 months. Compared to the full-court press utilized in the instant case by Agent Hernandez, the government in *Jacobson* acted with comparative restraint.
It is unmistakable that the Fifth Circuit in *Sandoval* was concerned with the defendant's knowing participation in the criminal venture. It was just as concerned, however, with a government operation which seemed to create this knowing participation through carefully directed solicitations.

The Ninth Circuit, in *United States v. Skarie*, also was troubled by the nature of the government involvement used to demonstrate the defendant's likely future commission of a crime. The defendant, who never had been convicted of a drug offense, "was attempting to kick a prior drug habit," and refused for over two months to participate. "[I]n the face of repeated requests by the government, [she] relented only after the government's agent made a number of graphic and violent threats against her and her family." The court ordered acquittal when the government's evidence of predisposition showed a willingness by the defendant only "after the government . . . devoted considerable time and effort to persuading the defendant." The court concluded that without such government action the defendant would not have committed the crime. Hence, it reached a justifiable finding of entrapment as a matter of law. A similar result is found in another case, though on an unusual set of facts. See *United States v. Beal*, 961 F.2d 1512, 1518 (10th Cir. 1992). Drug officers in Utah made a deal with an arrested individual who was "'facing a 1-to-15-year sentence'" so that he would get his charges dropped and dismissed if he worked with them in undercover sting operations. *Id.* at 1513. The informant was told to contact people known to him to see whether they were engaged in criminal behavior. *Id.* Based on these instructions, the informant contacted a number of persons. *Id.* at 1514. After several attempts, the informant was successful in contacting the defendant, Beal. *Id.* The informant expressed an interest in obtaining drugs from the defendant, who, after several calls from the informant, eventually agreed to meet with the informant. *Id.* In the ensuing 24 hours, the defendant participated in two drug transactions. *Id.* at 1514-15.

Here the Government behavior was not over an extended period of time, indeed it related only to events in a single 24-hour period during which the drug transactions occurred. *Id.* at 1516. The problem was that at the trial level, the jury found that the defendant had been
V. THE DEFENSE TODAY

Courts review evidence regarding the entrapment defense much more carefully since the Supreme Court's decision in Jacobson.155 This development is a breakthrough of major import. Traditionally, judges have not favored the defense and have viewed it with far more skepticism than have jurors.156 Still, while judicial scrutiny may be

entrapped with respect to the first transaction (at the beginning of that 24-hour period) but not as to the second transaction. Id. at 1513. However, the trial court, in ruling on a subsequent motion for judgment of acquittal, set aside the guilty verdict on the second count. Id. at 1515. The court of appeals affirmed and found, as a matter of law, that the government had initiated both transactions, that its attitude toward the defendant was persistent, and that there was insufficient evidence to demonstrate predisposition as to the second transaction if it could not have been shown with regard to the first. Id. at 1516-17. "[T]he discrete acts of the defendant were part of the same continuum of events motivated by the same influence." Id. at 1517. More to the point, relying on both Sherman and Jacobson, the court adopted the district court's ruling on entrapment as a matter of law:

It does seem to me that this is a case in which there was a strong original inducement and that in fact this defendant was preyed upon by the government informant to do something that he was not predisposed to do. I think he had his weakness played upon, he was beguiled, and it is a matter of logic that the jury recognized that and held him to be entrapped on the first charge.

Id. at 1515 (the issue in Beal raised the question of the applicability to the second charge).

155. See supra notes 105-06 and accompanying text.

156. See Ted Rohrlich, DeLorean Verdict a Quirk, Legal Scholars Believe, L.A. TIMES, Aug. 18, 1984, at A1, A27. Certainly the defense has fared better with jurors than with judges. See id. The premiere illustration of jurors' positive response to an entrapment claim is the acquittal of automaker John Z. DeLorean a decade ago in Los Angeles, see Jay Mathews, DeLorean Acquitted of All Eight Charges in Drug-Scheme Trial, WASH. POST, Aug. 17, 1984, at A1, A12, (although the more recent prosecution of now District of Columbia Mayor Marion Barry surely runs a close second). DeLorean was captured on videotape toasting a scheme to rescue his company with profits from a $24 million cocaine deal, rather strong evidence for a drug conspiracy case. Id. Still, the jury reacted harshly to the government's "set up" of the defendant, more harshly than judges routinely did at that time. See id. This point was made by well known criminal law scholar Charles Whitebread:

But if DeLorean's jurors had been U.S. Supreme Court justices, deciding his fate on purely legal grounds, rather than ordinary lay persons, who are presumably more subject to emotionalism, the outcome probably would have been different. . . .

The justices would probably have taken DeLorean's enthusiasm—displayed on videotapes as he and undercover agents discussed a cocaine deal to bail out his ailing car business—as conclusive evidence that he was not entrapped into illegal conduct, but was rather a willing participant . . . .
greater today, the law of entrapment, established more than half a century ago in the federal courts, has not changed and is not likely to change in the foreseeable future.

Clearly, there will not be a retreat from the subjective predisposition test that examines the defendant's state of mind; few courts will replace it with the objective, government-involvement test that analyzes the behavior of the government. Nor will we see the emphasis move to constitutional due process claims in the area.157 Instead, the entrapment

Rohrlich, supra, at A27. Professor Whitebread undoubtedly took a proper view of the then Supreme Court's entrapment jurisprudence. After seeing quotes from lawyers and jurors in the case, one is struck by the jury's correct view of the entrapment defense: DeLorean was found not guilty because of government overinvolvement in the scheme and a notion that he never would have undertaken an illegal narcotics transaction without the government plan. See David Margolick, A Case for DeLorean, N.Y. Times, Aug. 17, 1984 at B6; Mathews, supra, at A1.

157. Few courts find that convictions must be reversed as a result of a due process violation. Dismissals are appropriate only where the government conduct is such that it "shocks the universal cause of justice." United States v. Walther, 867 F.2d 1334, 1339 (11th Cir.), cert. denied, 493 U.S. 848 (1989) (citations omitted). Some judges are nevertheless influenced by due process concerns even if reversals are not warranted on that basis alone. See, for instance, the statement of the United States Court of Military Appeal in United States v. LeMaster, 40 M.J. 178, 181 (C.M.A. 1994):

We hold simply that targeting appellant in this case constitutes improper inducement of a servicemember, particularly by other servicemembers. Esprit de corps, good order and discipline, and high morale are not, in any way, enhanced or maintained by this type of police work. At a minimum, it violates the fundamental norms of "military due process" and is the functional equivalent of entrapment.

Id.; see also the separate statement by one judge in United States v. Hulett, 22 F.3d 779, 782 n.3 (8th Cir. 1994), discussed infra: "In my view, the reverse sting not only violates due process but also leads to corruption within the government itself. Government agents simply should not be in the business of selling cocaine or any other drugs."

The government's involvement also has implications for sentencing. The government sometimes acts to boost the culpability level by increasing the amount or type of drugs or weapons used in the sting. See United States v. Aikens, 64 F.3d 372, 375 (8th Cir. 1995) (government contact chose to purchase "hard" crack cocaine instead of "soft" form); United States v. Montoya, 62 F.3d 1, 3-4 (1st Cir. 1995) (holding that in order to succeed on claim of sentencing manipulation, defendants must establish extreme and outrageous conduct on part of government, not mere initiation of contact, encouragement of conduct, prolonging of conduct, or expansion in degree of conduct); United States v. Messino, 55 F.3d 1241, 1256 (7th Cir. 1995) (finding no sentencing manipulation for increased illegal firearms sales, as the government had a legitimate concern about sufficiency of proof from only a single transaction, and especially since many other means existed for the government to pursue had it really wanted to enhance defendant's sentence); United States v. Shepherd, 857 F. Supp. 105, 111 (D.D.C. 1994) (determining sentencing manipulation had occurred when government agent requested defendant
defense will, at least in form, remain unchanged and continue to have two elements: the inducement of the defendant by the government, and the lack of predisposition to commit the crime by the defendant.

While the form of the test has remained constant, what has changed is the manner in which courts are applying it in light of the Supreme Court's decisions in *Sherman* and, especially, *Jacobson*. The notion of predisposition is now properly placed in context. Courts should not merely ask whether the defendant was an enthusiastic participant; instead, the inquiry should be whether, without the government involvement, the defendant likely would have committed the crime in the foreseeable future. This distinction may seem subtle, but it is crucial. By examining government conduct, courts now look at the likelihood of criminal behavior as opposed to the eagerness of the defendant in responding to the solicitation. The notion of predisposition is now properly placed in context. Courts should not merely ask whether the defendant was an enthusiastic participant; instead, the inquiry should be whether, without the government involvement, the defendant likely would have committed the crime in the foreseeable future. This distinction may seem subtle, but it is crucial. By examining government conduct, courts now look at the likelihood of criminal behavior as opposed to the eagerness of the defendant in responding to the solicitation. The point is made powerfully in the *Hollingsworth* case, discussed previously. As noted there, Keith Jacobson was not a reluctant individual who had to be coaxed into buying the dirty magazines at the end of the government operation. The *Hollingsworth* court 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. The government did not offer Jacobson any inducements to buy pornographic magazines.

158. Which, of course, is why the timing for the test is of such significance. If, as suggested in the *Jacobson* dissent, the judge and jurors are to ask about the state of mind at the moment of the actual solicitation, Keith Jacobson would have lost. *See Jacobson*, 503 U.S. at 556-57 (O'Connor, J., dissenting). He prevailed because the majority did not indicate a single precise moment of significance for purposes of the predisposition inquiry. Rather, the evidence is to be evaluated for the entire period of governmental connection with the defendant, beginning with the first approach and ending with the actual solicitation to commit a crime. *Id.* at 553. In *Jacobson*, that was a 2 1/2 year period. *Id.* The government showed a non-reluctant participant at the end of this time frame, but could not demonstrate any great inclination “prior to the Government acts . . . and independent of the Government’s acts.” *Id.* at 553-54. *See generally* United States v. Brown, 43 F.3d 618, 627 (11th Cir. 1995) (stating that “predisposition has a definite temporal reference: the inquiry must focus on a defendant’s predisposition before contact with government officers or agents”) (citing *Jacobson*, 503 U.S. at 547 n.2.).

159. *See supra* notes 112-35 and accompanying text.
or threaten him with harm if he failed to buy them. It was not as if the government had had to badger Jacobson for 26 months in order to overcome his resistance to committing a crime. He never resisted. ¹⁶⁰

Thus, the emphasis is not on the defendant’s eagerness, but rather the danger created by his mental state. Indeed, Justice White, for the majority in Jacobson, illustrated this distinction in striking down the conviction: “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.”¹⁶¹ The key phrase there, certainly, is whether the defendant is one who, without the government contact, “likely would have never run afoul of the law.”¹⁶² The appropriate question is, therefore, would she have done it? We are not to be concerned exclusively with the guilty mind of the defendant or, in the abstract, her criminal intent. Instead, a court must determine if she probably “would have run afoul of the law,” or at least run afoul of it in the foreseeable future, without the government action. This analysis returns to the original purpose of the entrapment defense: that a non-dangerous individual should not be punished. This idea can be traced back to the Supreme Court’s first major opinion in the area.¹⁶³ In Sorrells, the Court relied heavily on, and quoted at length, the language of a 1921 Eighth Circuit decision¹⁶⁴ which looks strikingly similar to the comments made above.

[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.¹⁶⁵

Seemingly, these roots were abandoned or ignored prior to Jacobson. As the Hollingsworth court observed:

¹⁶⁰. Hollingsworth, 27 F.3d at 1199 (emphasis in original).
¹⁶¹. Jacobson, 503 U.S. at 553-54.
¹⁶². Id.
What is true is that until the Supreme Court’s recent decision in *Jacobson*, the courts of appeals had been drifting toward the view that the defense of entrapment must fail in any case in which the defendant is “willing,” in the sense of being psychologically prepared, to commit the crime for which he is being prosecuted, even if it is plain that he would not have engaged in criminal activity unless inveigled or assisted by the government.  

The best illustration of this is the short opinion of the Second Circuit in *United States v. Ulloa*, in which the defendant, claiming entrapment, argued that the jury should have been instructed as to whether the defendant “was not only willing but also ready to commit the crime, in the sense of having the present physical ability to do so.” The court disagreed, writing that the “focus of the entrapment inquiry, once inducement by the Government is established, is on the defendant’s state of mind.” The court emphasized that it had never found “that the Government was required to prove readiness . . . to sustain its burden in proving predisposition.”

*Ulloa*, however, was decided three years before *Jacobson*. Its view of predisposition cannot “be squared” with *Jacobson*. In *Jacobson*, the defendant’s purchase of magazines was the result of a twenty-six-month campaign of inducement by the government. Still, the defendant showed no reluctance to purchase magazines, a point seized upon by Justice O’Connor in her dissenting opinion. Thus, if willingness or enthusiasm was the sole or even principal criterion in

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166. *Hollingsworth*, 27 F.3d at 1198 (internal citations omitted).
167. 882 F.2d 41 (2d Cir. 1989).
168. *Id.* at 44.
169. *Id.*
170. *Id.*
171. Though even some post-*Jacobson* opinions offer language similar to *Ulloa*. See, e.g., *United States v. Mendloza-Salgado*, 964 F.2d 993, 1002 (10th Cir. 1992) (explaining that, when examining the entrapment defense, the “focal point . . . centers on the defendant’s intent or predisposition to engage in the offense rather than the degree of government involvement” and that the purpose of the defense is “to protect an otherwise unpredisposed individual from government coercion”). See generally *United States v. Hulett*, 22 F.3d 779, 781 (8th Cir.) (concluding there was no entrapment as a matter of law because defendant was clearly disposed to commit the crimes for which he was convicted as defendant had routinely dealt in drugs during the relevant time period), *cert. denied*, 115 S. Ct. 217 (1994).
172. See *Hollingsworth*, 27 F.3d at 1198.
174. *Id.* at 554 (O’Connor, J., dissenting).
defeating an entrapment claim, Jacobson's conviction should have been affirmed. It was not.

The distinction between a defendant's response to government encouragement and the probability of his committing a crime without such inducement is at the heart of an entrapment defense. The defense, in the subjective, predisposition jurisdictions does not only ensure that innocent minded individuals never go to jail. It also mandates that criminal punishment is not to be for a guilty mind, but only for a guilty action or at least a probability of such an action. The challenge is to identify individuals who pose a serious threat to the community without government solicitation. Judge Posner stated the matter well:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: 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. However, 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. 175

If the Seventh Circuit in Hollingsworth is correct, as I believe it to be, why until recently have so few judges looked to evidence indicating the probability that a particular defendant would commit a crime without governmental encouragement? Perhaps the confusion in this area has been generated by the numerous references to the entrapment defense being created to protect a "law abiding citizen" 176 or the "innocent" person. 177 These references are unfortunate. Instead, attention, and legal protection, should be given to the defendant in the entrapment case who, absent government involvement, "resists the temptations, which

176. See, e.g., Mendoza-Salgado, 964 F.2d at 1004; Van Slyke, 976 F.2d at 1162.
abound in our society today, to commit crimes,"^{178} a person whom the
government "beguiles . . . into committing crimes which he otherwise
would not have attempted."^{179}

The better approach is to apply the tried and true criminal law notion
of causation to entrapment. This principle asks whether the defendant is
"a person who, but for the inducement offered, would not have
conceived of or engaged in conduct of the sort induced."^{180} Under this
approach, the government’s behavior becomes of paramount importance
viz-à-viz the defendant’s mental state. This strategy is demonstrated in
both Sherman and Jacobson where each Court asked whether the crime
resulted from the agent’s actions or from the defendant’s prior inclinations.^{181}
"Under the subjective test, the basic question is causa-
tion—whether the person’s criminal conduct was caused by the creative
activity of the officer or by the person’s own predisposition."^{182} This
adoption of the causation principal in entrapment cases has been
repeatedly emphasized by other courts. The District of Columbia Circuit
asked: "[D]id the government’s behavior go beyond merely offering [the
defendant] the opportunity to break the law, and if it did, was he so
predisposed to commit the crime that his predisposition rather than the
government’s action caused the crime?"^{183} The Alaska Supreme Court
stated: "The whole doctrine derives from a spontaneous moral revulsion
against using the powers of government to beguile innocent, though
ductile, persons into lapses which they might otherwise resist."^{184} The
Fifth Circuit also addressed this matter by offering: "The government
must not lead astray by persuasion or proffered delight even those who

180. Evans v. People, 706 P.2d 795, 801 n.6 (Colo. 1985); see also United States v.
Manzella, 791 F.2d 1263, 1269 (7th Cir. 1986) (explaining that "[a]s a defense to a criminal
prosecution ‘entrapment’ means the government’s inducing a person to commit a crime who was
not predisposed to commit it—in other words, who would not have committed it but for the
particular inducement that the government held out").
181. This point again brings to mind Judge McGowan’s admonition to look to the
government inducement in order to evaluate the defendant’s state of mind. See supra text
accompanying note 109.
182. State v. Foster, 838 S.W.2d 60, 65 (Mo. Ct. App. 1992), cert. denied, 507 U.S. 994
(1993).
opinion in United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933)). The court ultimately
adopted the objective test for the defense. Id. at 231.
had some criminal instincts but 'who would normally avoid crime and through self-struggle resist ordinary temptations.' 185

In the last few years, some courts have not moved toward this causation approach, claiming that it is not mandated by the Supreme Court. 186 These courts are wrong; they misread both Chief Justice Warren's opinion in Sherman and Justice White's in Jacobson. According to the Hollingsworth court, the Supreme Court clarified the meaning of predisposition. Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. The dictionary definitions of the word include "tendency" as well as "inclination." . . . [It must be shown] that it is likely that if the government had not induced him to commit the crime some criminal would have done so. 187

In accordance with this reasoning, the Minnesota Court of Appeals has correctly and succinctly stated the test for establishing predisposition. 188 The prosecution must show that the defendant would have committed a crime "absent [the government agent's] inducements." 189 Otherwise, as written in the United States v. Hollingsworth panel opinion, the person "is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character." 190

VI. THE SHIFTING SANDS OF THE ENTRAPMENT DEFENSE

Some lawyers, scholars, and judges will doubt the view put forth here and the intense scrutiny it demands of governmental behavior. They

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185. Pierce v. United States, 414 F.2d 163, 165-66 (5th Cir. 1969) (quoting Sherman, 356 U.S. at 384 (Frankfurter, J., concurring)).
186. See, e.g., United States v. Harvey, 991 F.2d 981, 993 (2d Cir. 1993) (stating that "Jacobson did not change the law so that when a suspect promptly avails himself of a government-sponsored opportunity to commit a crime, that suspect thereafter can successfully claim he was entrapped as a matter of law") (emphasis in original).
187. Hollingsworth, 27 F.3d at 1200.
189. Id.
190. 9 F.3d 593, 598 (7th Cir. 1993). Almost 20 years earlier, Judge Hastie asserted in a narcotics case that the law enforcement activity must "facilitate discovery or suppression of ongoing illicit traffic in drugs. [Otherwise] [i]t serves no justifying social objective." United States v. West, 511 F.2d 1083, 1085 (3d Cir. 1975).
may wonder why such emphasis is needed, particularly in cases in which the defendant seems to demonstrate predisposition by reacting quickly and enthusiastically to a limited inducement. Two responses address these concerns. First, the process illustrated by Jacobson focuses attention on the inducement because it may well demonstrate if the defendant, absent government involvement, posed any real threat of committing criminal acts. It is difficult to imagine a more appropriate inquiry in our criminal justice system than one that examines individual culpability and danger.

Second, such an added emphasis on the government behavior hardly imposes an onerous burden on the prosecution. In cases in which the inducement is limited or in which the defendant shows no reluctance, an entrapment claim will not be taken seriously. Where, however, as in both Sherman and Jacobson, the inducement is extreme and extended or where the defendant has moved forward with great reluctance, the added emphasis on the government's action may reveal a great deal about the true origin of the crime. Thus, where an agent simply offers once to buy drugs at street value and the defendant quickly prepares for the sale, the defense will fail. If, however, the agent had to make numerous requests, the defendant was clearly trying to avoid using drugs, and there was no evidence of recent criminal behavior by the defendant, acquittal will be necessary.¹⁹¹

Critics of this approach also may deny that there has been a dramatic shift in the application of the entrapment defense as a result of Sherman and Jacobson.¹⁹² Such denials, however, ignore the very real impact of these opinions on the analysis of the entrapment defense in the criminal justice process. Two examples demonstrate the influence of Sherman and Jacobson.

¹⁹¹ These facts, of course, come directly from Sherman. See Sherman, 356 U.S. at 373-76.
¹⁹² See, e.g., Fred W. Bennett, From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law and Related Defenses, in Federal Court, 27 WAKE FOREST L. REV. 829, 842 (1992) (stating that the net effect of Jacobson is to leave the test for entrapment unchanged); Damon D. Camp, Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard, 83 J. CRIM. L. & CRIMINOLOGY 1083-84 (1993) (asserting that while the crux of the Jacobson decision was predisposition, the Jacobson court offered no advice to what constitutes this concept); Christopher D. Moore, Comment, The Elusive Foundation of the Entrapment Defense, 89 Nw. U. L. REV. 1151, 1188 (1995) (arguing judicially crafted entrapment policies should be replaced by more limited legislation).
In a recent FBI bulletin, a legal instructor at the FBI Academy discussed entrapment and Jacobson. He gave the following advice to agents planning to initiate undercover investigations:

[A]ll law enforcement officers should consider the following three points before conducting undercover investigations. First, while reasonable suspicion is not legally necessary to initiate an undercover investigation, officers should nonetheless be prepared to articulate a legitimate law enforcement purpose for beginning such an investigation. Second, law enforcement officers should, to the extent possible, avoid using persistent or coercive techniques, and instead, merely create an opportunity or provide the facilities for the target to commit a crime. Third, officers should document and be prepared to articulate the factors demonstrating a defendant was disposed to commit the criminal act prior to government contact.

This sensible advice is not offered because the federal courts have adopted a demonstrably different test. Instead, the instructor was reacting to concerns about the review judges will give to the agents' activities if the defendant claims entrapment. The FBI should be able to demonstrate that without its involvement, a defendant would likely have committed a crime and thus could not have been entrapped. The government can make this showing by proving that its involvement was quite limited, that prior to the FBI contact the defendant had a reputation as a person inclined to commit the criminal act, or that the individual's response clearly indicated he had practical knowledge about the crime.

The shift towards examination of governmental actions is also seen in the United States Attorney's recent decision to suspend murder conspiracy charges against Qubilah Bahiyah Shabazz, daughter of Malcolm X. Because the alleged plot of Shabazz to have Louis Farrakhan killed was closely intertwined with the involvement of an informant who was a childhood friend, her defense counsel stated that its case would be centered almost entirely on the entrapment defense.

194. Id. at 32.
195. The suspension of murder conspiracy charges was achieved through a "Pretrial Diversion Agreement." See United States v. Shabazz, Crim. No. 4-95-3 (D. Minn.) (on file with author).
Indeed, the United States Attorney, in explaining the rather remarkable disposition of the case, 196 made reference to the central thesis of the entrapment defense as put forth in this Article. He said that he made his decision "in the belief that [Shabazz] is not presently dangerous." 197 A somewhat odd statement considering he also claimed the defense did not have a viable entrapment claim, 198 and that Shabazz was "a woman who not only was predisposed to kill Minister Farrakhan, but was deadly serious about it." 199 The government's decision to divert Shabazz from prosecution was made because, "under the proper supervision, Ms. Shabazz does not appear to be dangerous" even though her claims, according to the prosecuting attorney, "do not amount to a legal defense." 200 It can be readily assumed that the government position was heavily influenced by a potential finding that Shabazz was not likely to have initiated a murder plot against Louis Farrakhan without the involvement of a questionable government informant. 201

This Article has argued that while the elements of the entrapment defense have not been altered, the manner in which those elements are being applied has resulted in more careful review of evidence concerning government activity and the defendant's state of mind. This review, which is being conducted by judges, attorneys, and law enforcement officials, addresses whether an individual would have committed a crime without government involvement. This change in the application of the test, which is warranted by the Supreme Court's decisions in Sherman and Jacobson, marks a shift in the theory of entrapment law. However, one can properly ask whether this trend actually changes the result in cases where the defendant claims entrapment. Does all this discussion over a shifting emphasis really matter?

At the outset of this Article, I discussed five individuals who, despite claiming entrapment, were convicted of various crimes. 202 If these

198. Id.
199. Id.
200. Id.
201. "[T]he informant has what might charitably be called a very checkered past and might be pursuing several agendas." Id. For discussions of the case, see generally The Troublesome Shabazz Case, N.Y. TIMES, Mar. 25, 1995, at A22 (describing the government's use of a paid informant); Gladwell, supra note 196 (detailing the reasoning behind the dropped charges).
202. See supra text accompanying notes 1-44.
cases were tried today, would the defendants be convicted, or, instead, would courts conclude that they had been entrapped, perhaps even as a matter of law? Let us consider, again, each of them.

Tobias, who attempted to manufacture drugs, did not have a pure mind. The government involvement with him, though, was overwhelming. The dissent in *Tobias* wrote:

Utilizing the chemicals provided by the DEA and the formula provided by the DEA, Tobias attempted to manufacture a drug suggested by the DEA. However, the agency's encouragement, pervasive influence, and active participation did not end there. Still uncertain about how to actually make the drug, from April 29 through May 9 Tobias telephoned the supply company 13 times and his wife called on three other occasions to obtain information and additional advice concerning the procedure at each stage of the manufacturing process. It is undisputed that Tobias did not know how to make PCP and that during those phone calls the DEA agents instructed him as to each step in the process. Agents for the Government, therefore, guided the defendant in every stage of the process, from inception to termination.203

Barger, the Hells Angels leader, was undoubtedly a dangerous character. Still, it was the government agent who was engaged in offering the following inducements:

approaching Mr. Barger with a fictional plan to blow up the Chicago Outlaws' clubhouse; providing an alibi for the plan; urging Mr. Barger to talk with the Alaska Hells Angels for guidance in a retaliation; and telling Mr. Barger that he, [the government agent], was doing all the leg work in order to encourage Mr. Barger to act.204

Mummert, who needed money to build a new facility for his car dealership, also was eager to work with the government agent to receive $1.2 million.205 Yet, he was a businessman with no prior criminal record and was desperate to receive the needed large sum of money (precisely $1.2 million) to save his lawful investment.206

204. *Barger*, 931 F.2d at 365-66.
206. Id.
Musslyn's case, in retrospect, looks strikingly like Jacobson's. He, too, was pursued vigorously by the government for a long period of time.\textsuperscript{207} It is true that evidence of other crimes was present against him.\textsuperscript{208} Unlike Jacobson, however, Musslyn was the subject of the Postal Service operation for more than five years,\textsuperscript{209} and was personally encouraged.\textsuperscript{210}

Finally, the case against Judge Hunt was hardly powerful. Government agents targeted Hunt based only on the unsubstantiated claim of a criminal, who offered the judge a bribe but was refused.\textsuperscript{211} As the Fourth Circuit itself noted, it "may readily be conceded that the evidence of predisposition is not overwhelming here."\textsuperscript{212}

Based on the Supreme Court's opinion in \textit{Jacobson}, I believe that each of these five defendants today would have had a strong chance of winning his entrapment claim, either as a matter of law\textsuperscript{213} or with a verdict from a properly instructed jury. The above cases depict individuals either unlikely to commit the crime without government inducement, incapable of completing the charged crime, or unwilling to finish the criminal endeavor. In each case the government vigorously pursued the defendant and often handled most of the activities involved in the criminal planning.

These examples are not oddities selected simply to demonstrate that, on the fringes, the changing entrapment defense might only affect a small number of bizarre cases. Rather, these fact patterns represent fairly typical entrapment scenarios involving common types of undercover operations. They also demonstrate the FBI instructor's sound advice: in order to conduct intensive, long-term operations successfully the government should be able to offer evidence of the defendant's criminal purpose before any government contact and of the defendant's likely future criminal behavior.\textsuperscript{214} Moreover, such evidence will not necessarily be inferred from an enthusiastic response of an embittered gang leader like Barger or an embattered businessman like Mummert.

\begin{itemize}
\item \textsuperscript{207} Musslyn, 865 F.2d at 945-46.
\item \textsuperscript{208} Id. at 946.
\item \textsuperscript{209} See id. Jacobson was pursued for half that period. See \textit{Jacobson}, 503 U.S. at 550.
\item \textsuperscript{210} Musslyn, 865 F.2d at 946.
\item \textsuperscript{211} See Hunt, 749 F.2d at 1080.
\item \textsuperscript{212} Id. at 1086.
\item \textsuperscript{213} After all, the Supreme Court did not send the case back for further proceedings in \textit{Jacobson}. It held that the defendant had been entrapped as a matter of law and that the issue never should have been sent to the jury. \textit{Jacobson}, 503 U.S. at 554. The result was the same in \textit{Sherman}. See \textit{Sherman}, 365 U.S. at 373.
\item \textsuperscript{214} See supra text accompanying note 194.
\end{itemize}
If these five cases would truly end in acquittals or directed judgments today, should this outcome make an observer of the criminal justice system feel uncomfortable? Not at all. The lesson of Sherman and Jacobson is that courts should carefully analyze the evidence of government involvement, even though the principal entrapment element is predisposition. Judges and juries should evaluate the likelihood of criminal behavior, not just whether the defendant was a relatively enthusiastic participant in the enterprise. The government inducement of Sherman was not overbearing and relentless. In contrast, Jacobson did respond quickly to a solicitation and there was at least some evidence of predisposition. Still, with strong language the Supreme Court struck down both convictions, finding entrapment as a matter of law. Without government solicitation these defendants would not likely have committed the crimes.

VII. CONCLUSION

We should not be overly concerned with the consequences of a more stringent application of the entrapment test. Still, the Supreme Court's protective view of the entrapment defense may make it more difficult for the government to engage individuals in long-term operations. To be sure, this view of entrapment may prohibit law enforcement techniques which, I suspect, most people assume are already forbidden. That is, agents may not be able to become so involved in the criminal enterprise that they, in essence, operate it. Officers may not be able to plant the idea of crime in the mind of the citizen and then ensure its fruition by a process of detailed instructions to that citizen. Moreover, the government may not be permitted to conduct an operation in which the individual is targeted over a very long period of time and then only solicited to commit a crime at the end of the extensive investigation.

If the current application of the entrapment defense results in these limitations, such a development should be applauded. These limitations do not impose undue restrictions on the government's investigation of

215. See Sherman, 365 U.S. at 373-76.
216. See Jacobson, 503 U.S. at 542-44 (explaining that Jacobson enrolled in the American Hedonist Society shortly after being contacted by the Government, and that he also had a predisposition for ordering sexually-oriented magazines, as he had done so a year prior to contact).
217. See supra note 94 and accompanying text.
218. See supra notes 100-06 and accompanying text. Indeed, there will be some who will argue that such an application will invariably lead to the sort of pre-investigative individualized suspicion which the courts have consistently declined to adopt. I disagree. See supra note 106.
criminal activities. Consider, for instance, the five defendants discussed previously. Each was convicted after his entrapment claim was rejected. Today, however, each would have a greater chance of prevailing on the defense. In all the cases, however, law enforcement could have curtailed any criminal activity without entrapping the suspects.

In the Barger case, the agent did not need to plan the Hells Angels’ retaliation. He could have left the initiative to Barger, in order to determine if he truly would have attempted the bombing. Similarly, the undercover officer did not have to speak with Tobias on thirteen different occasions about the manufacture of drugs. Afterall, if Tobias could not figure out the process after being provided with the materials, he probably was not that much of a risk. Judge Hunt was pursued on the word of two criminals eager to make a deal with prosecutors.\(^\text{219}\) Certainly, the government agents could have investigated further, had less direct contact with the judge, and made initial inquiries to ascertain his reactions. Mummert was a desperate man, in need of $1.2 million to save his car dealership.\(^\text{220}\) He was offered exactly the amount he needed, and prompt payment in exchange for engaging in criminal activity. The government could still have justified its operation to determine if he would look to other criminal actions to get the necessary money by giving him less than he needed. As for Musslyn, one might well ask why the pursuit took five years and why an officer had to meet personally with him in a bar to discuss pornographic materials.\(^\text{221}\) If he was a threat, surely something less intense and dramatic would have led the government to conclude that Mummert was an individual likely to commit a crime even without the agent’s involvement.

Detecting crime can be a perilous endeavor. The very process of undercover operations can encourage law enforcement to go beyond investigation of crime and become intertwined in the commission of the crime. As a result, the entrapment defense exists to draw a fine line between the detection and the creation of crime. Ultimately, though, the entrapment defense was created not simply to curb undue government behavior, but also to determine if the defendant was truly a threat to society. Therefore, officers and agents are required, under the entrapment doctrine, to ensure that without official government inducement, an individual would have committed the criminal act within the foreseeable future.

\(^\text{219}\) See Hunt, 749 F.2d at 1080.
\(^\text{220}\) See Reynoso-Ulloa, 548 F.2d at 1331.
\(^\text{221}\) See Musslyn, 865 F.2d at 946.
It has repeatedly been written that simply offering the opportunity to commit a crime is not entrapment.\(^{222}\) It is difficult to disagree with that view. But, and this is the principal concern, it is not merely "an opportunity" when the inducement extends over a tremendously long period of time, when the officers seek out desperate individuals and play to their particular needs, or when the agents themselves become the major architects of the criminal operation. In such situations, unless there is strong evidence of other criminal activity by the suspects, the government has entrapped them. At a minimum, the government involvement casts grave doubt over whether this person would have committed a crime without such extensive involvement.

The tougher application of the entrapment defense will have limited impact on the majority of undercover operations. In many cases, law enforcement officers have excellent, and well documented, reasons for initiating the undercover investigation process. To be sure, when challenged by defense counsel, the government is able to offer ample evidence of a defendant's criminal behavior and desire to continue to engage in illegal activity. The well publicized prosecution of "Hollywood Madam" Heidi Fleiss is just such a case.\(^{223}\) Police officers there posed as businessmen and used the services of Fleiss' exclusive prostitution enterprise.\(^{224}\) At trial she raised an entrapment defense which was soundly rejected.\(^{225}\) The judge, in sentencing her to three years in prison, alluded to the government's substantial proof of Fleiss' ongoing, illegal ring by stating, "[t]his was a highly sophisticated and lucrative criminal enterprise."\(^{226}\) With Fleiss, the police had done an extensive early investigation and were able to show convincingly that she had organized a business that was engaged in acts of prostitution.

\(^{222}\) See, e.g., United States v. Wright, 63 F.3d 1067, 1071 (11th Cir. 1995) (noting that the proffer of an opportunity alone does not support the defense of entrapment); see also United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994) (explaining that "[a]n '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") (emphasis in original).


\(^{224}\) Id.


\(^{226}\) Hollywood Madam Is Sentenced to Prison, supra note 223. On appeal, her conviction—in an unpublished opinion—was reversed on the ground of jury misconduct. No mention was made of the entrapment defense. People v. Fleiss, Super. Ct. No. BA 083380 (May 28, 1996).
and would have continued without the officers' participation.\footnote{See Zamichow, supra note 225. In somewhat more usual prosecutions the government often has little difficulty demonstrating the likelihood of illegal action by the defendant. As stated by the Second Circuit:

Arguably there is some evidence of inducement, given that a government agent and an informant contacted [the defendant] with respect to the drug transactions. The government, however, presented uncontradicted evidence that [defendant] was predisposed to commit the crime. The government demonstrated that [defendant] was dealing and negotiating with [a government informant] prior to the time that [the informant] agreed to cooperate with the authorities. Moreover, there was ample proof that [the defendant] had been involved in drug dealing prior to any involvement with a government agent or informant. [The defendant] offered no evidence to rebut this showing of predisposition.}

United States v. Hurtado, 47 F.3d 577, 585 (2d Cir. 1995).

In the widely publicized terrorism conspiracy trial of Egyptian Sheik Omar Abdel Rahman and nine co-defendants, the defense raised questions of over-involvement by the F.B.I. John L. Goldman & Robert L. Jackson, Sheik, 9 Others Guilty in N.Y. Terrorism Plot, L.A. TIMES, Oct. 2, 1995, at A1. The informant, a former Egyptian army officer, was allegedly allowed to "set up" the defendants on a path of crime with little supervision from the F.B.I. \textit{id.} at A12. The evidence, however, demonstrated that the informant had secretly taped more than one hundred hours of conversations with the defendants, and videotapes showed the defendants mixing explosives and advising each other about how to obtain bomb detonators. \textit{id.} In another fact setting, the government also proved prior criminal intent on the part of the defendants. See Ron Seely, Lake Perch Poacher Is Sentenced, WIS. ST. J., Sept. 30, 1995, at 1A. In this government operation, agents of the U.S. Fish and Wildlife Service created an undercover wholesale company in an elaborate scheme to nab fish poachers. See \textit{id.}. However, unlike in some of the cases discussed in this Article, the defendants in the poaching scheme were merely given an opportunity to sell the fish to the agents. \textit{id.} Video cameras showed several of the defendants coming to the operatives to sell their illegal fish. \textit{id.}

Yet another recent case involved a long-term undercover operation of factories, warehouses, and shops in New York City. See George James, Agents Raid Production Lines in Queens for Fake Labels, N.Y. TIMES, Sept. 28, 1995, at B3. Customs agents pursued a Korean organized crime ring which was manufacturing goods overseas for sale in the United States under counterfeit labels. \textit{id.} The three-year investigation, "Operation Pipeline," was only initiated after a private company, Chanel, approached Miami customs officers with substantial information about the on-going counterfeiting project. \textit{id.} The undercover customs agents pretended they could facilitate the importation of counterfeit merchandise into the United States without seizure by Customs officials. \textit{id.}

\textit{See generally} United States v. Aikens, 64 F.3d 372, 375 (8th Cir. 1995) (concluding that the evidence, instead of demonstrating inducement by the government contact, in fact showed that defendant possessed great skill and sophistication in effectuating the narcotics sale, which precluded a finding of entrapment); United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995) (holding that defendant's predisposition to smuggle drugs, based on defendant initiating transaction, defendant's eagerness to meet a big-time dealer played by an undercover agent, and a lack of reluctance to participate combined with defendant's admission of involvement in prior...
was not entrapped.

With long-term investigations, intensive operations, or tremendous incentives to commit crime being offered, government investigators ought to be able to point to more than a willingness, or even an eagerness, on the part of the defendant to participate in the crime. Instead, the prosecution must show that even without the government involvement the person would have been likely to commit a crime in the foreseeable future. This result strikes the proper balance between careful investigation by the government, and the creation of unlawful behavior.

In his strong dissent in one of the earliest entrapment decisions, Justice Brandeis anticipated the issue that has become even more pronounced today.228 The question then, as now, was how courts were to identify the true criminal once the government was heavily involved in the illegal enterprise.229 He argued against allowing prosecutions where the defendant was not shown to be dangerous without government involvement.230 Almost seven decades later, courts are increasingly following the advice he gave in his dissent:

The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature.231

The post-Jacobson scrutiny of the entrapment defense and government inducement helps greatly in determining that such government provocation or creation has not occurred. That is the purpose of the entrapment defense, a purpose worthy of strong support.

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229. Id. at 421 (Brandeis, J., dissenting).
230. Id. at 423-25 (Brandeis, J., dissenting).
231. Id. at 423 (Brandeis, J., dissenting).