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"Ready? Induce. Sting!": Arguing for the Government's Burden of Proving Readiness in Entrapment Cases

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NOTES

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INTRODUCTION

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . [F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[1]
>
> —Justice Oliver Wendell Holmes

* I am grateful for the support of my wife, Jenny, and son, Daniel.

1. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

For over 100 years the United States judiciary has struggled with the sting[2] and the entrapment defense,[3] examining whether government agents deviously manufacture crimes or merely afford criminals the opportunity to commit them.[4] The sentiments of Justice Holmes were rare for his time, but today they are reflected in a growing sympathy for sting victims.[5] While courts are now more willing than ever to find entrapment,[6] they still differ over the burden of proof that the government must satisfy to overthrow an entrapment defense.[7] Spe-

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2. A sting is an undercover police operation where police pose as criminals to trap law violators. *See* BLACK'S LAW DICTIONARY 1426 (7th ed. 1999). The Supreme Court has repeatedly emphasized that in a sting the government's role is solely to afford the opportunity to commit a crime. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." Sorrells v. United States, 287 U.S. 435, 441 (1932). The government's endorsement of sting operations is based upon the government's ability to simulate reality. *See* United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir. 1994) [hereinafter *Hollingsworth II*] ("[T]he government may not, in trying to induce the target of a sting to commit a crime, confront him with circumstances that are different from the ordinary or typical circumstances of a private inducement.").

3. "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Sorrells*, 287 U.S. at 454 (Roberts, J., concurring). Entrapment is a defense to criminal prosecution in every jurisdiction in the United States. Tennessee was the last jurisdiction to recognize the defense. *See* 22 C.J.S. *Criminal Law* § 58 n.95 (1989). Entrapment is found where the government induced a defendant to commit a crime he was not predisposed to commit. *See, e.g.*, Mathews v. United States, 485 U.S. 58, 63 (1988).

4. The entrapment defense first appeared in judicial opinions written in the latter half of the nineteenth century. *See* Saunders v. People, 38 Mich. 218 (1878); Board of Comm'rs v. Backus, 29 How. Pr. 33 (N.Y. 1864). A majority of the Supreme Court first expressed its distaste for manufactured crime in its finding of entrapment in *Sorrells*. "There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self respecting tribunal." *Sorrells*, 287 U.S. at 454.

5. *See generally* PAUL MARCUS, THE ENTRAPMENT DEFENSE § 1.03 (2d ed. 1995) (documenting the evolution of entrapment in the United States).

6. *See* Paul Marcus, *Presenting, Back from the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205, 220 (1995). Marcus attributes this conclusion to the growing concern among judges throughout the country that undue involvement by the government may constitute entrapment even where the defendant appeared willing to commit the crime. *Id.* at 220.

7. To convict a defendant who makes a colorable case that he was entrapped, the government must prove lack of entrapment beyond a reasonable doubt. *See* Jacobson v. United States, 503 U.S. 540, 549 (1992). Initially, to plead entrapment, the defendant must make a showing of improper government inducement. Then, "[t]o defeat a defense of entrapment the government must show either that it did not induce the defendants to commit the crime for which they are being prosecuted or, if it did, still they were predisposed to commit it." United States v. Hollingsworth, 9 F.3d 593, 597 (7th Cir. 1993) [hereinafter *Hollingsworth I*].

A defendant may show improper inducement by producing any evidence sufficient to raise concern " 'that the government's conduct created a substantial risk that the offense would be committed by a person other than the one ready to commit it.' . . . This burden is light because a defendant is generally entitled to put a recognized defense to the jury where

cifically, courts disagree about whether the burden includes proof that the defendant had the ability and resources to commit the specific crime, so that if the government had not done so, it is likely that someone else would have induced the defendant to commit the crime.[8] This requirement is known as the "positional" factor or "readiness" element.[9]

The prelude to this disagreement was the latest ruling of the United States Supreme Court in the entrapment arena. In *Jacobson v. United States*,[10] the Supreme Court held that "[w]here the Government has induced an individual to break the law and the defense of entrapment is at issue... *the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act* prior to first being approached by Government agents."[11]

Since the Court's decision in *Jacobson*, the federal courts have attempted to define and apply the Supreme Court's standard of "predisposition." The two approaches that have attracted the greatest attention, because of their direct and particular conflict, have distilled the *Jacobson* inquiry into a multifactored analysis to determine the predisposition of a defendant.[12]

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sufficient evidence exists for a reasonable jury to find in her favor." United States v. Brown, 43 F.3d 618, 623 (11th Cir. 1995) (citations omitted) (quoting United States v. Dickens, 524 F.2d 441, 444 (5th Cir. 1975)). Inducement may be satisfied by little more than a suggestion or an opportunity to commit a crime. *See Sorrells*, 287 U.S. at 451-52. In *Jacobson v. United States*, the government did not offer the defendant any inducements nor did the government threaten him, and the defendant never resisted committing the crime, but nonetheless the government had to prove predisposition. *See* United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir. 1994) (highlighting the "unquestionably peculiar" facts in the Supreme Court's *Jacobson* case).

8. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1200 (arguing in favor of proof of ability and resources). *But see* United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997) (refusing to adopt such a "positional" requirement).

9. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1199-1200.

10. 503 U.S. 540 (1992) (finding entrapment where a sting led to the unlawful receipt and possession of child pornography).

11. *Jacobson*, 503 U.S. at 548-49 (emphasis added). Since *Jacobson*, courts have emphasized the initial conversation between the government agent and the defendant, and the defendant's reactions to that conversation, as evidence of the defendant's pre-contact disposition. *See* United States v. Gendron, 18 F.3d 955, 964 (1st Cir. 1994); United States v. Goulding, 26 F.3d 656, 665 (7th Cir. 1994); United States v. Skarie, 971 F.2d 317, 320 (9th Cir. 1992).

12. To date, four different analyses have been advanced by circuit courts. Two courts have defined "predisposition" so broadly as to provide minimal guidance beyond *Jacobson*. *See* United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995) (commenting that predisposition is a "subjective inquiry into a defendant's state of mind... [and it] cannot be reduced to any enumerated list of factors for a reviewing court to examine"); *Gendron*, 18 F.3d at 964 (concluding that a defendant's predisposition can be resolved by asking how he would react to an ordinary opportunity to commit a specific crime).

Due to the generality of the First and Eleventh Circuits' approaches, no court has explicitly disagreed with either of their holdings. Even the Seventh and Ninth Circuits, which are at odds with each other, both claim to comply with the First and Eleventh Circuits'

In *United States v. Skarie*, the Ninth Circuit employed a five-factor test to assess predisposition.[13] The test analyzes: (1) the character of the defendant, (2) whether the government agent or the defendant first suggested the criminal activity, (3) whether the defendant engaged in the activity for profit, (4) whether the defendant demonstrated reluctance, and (5) the nature and timing of the government's inducement.[14] In *United States v. Hollingsworth*,[15] the Seventh Circuit amended the *Skarie* five-factor test[16] by adding a readiness element.[17] This element evaluates the readiness and ability of the defendant to commit the crime.

In *Hollingsworth* the court stated that the proper victim of a sting is a predisposed person, "ready and willing"[18] to commit an offense be-

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analyses. *See* United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997); *Hollingsworth II*, *supra* note 2, 27 F.3d at 1199. Furthermore, when the Fifth Circuit approached the issue, it regarded *Hollingsworth II* as the dividing line in entrapment doctrine, and regarded itself as siding either with or against the *Hollingsworth II* court, disregarding the generality and ambiguity of the First and Eleventh Circuits. *See* United States v. Knox, 112 F.3d 802 (5th Cir. 1997), *aff'd en banc on other grounds sub nom.* United States v. Brace, 145 F.3d 247 (5th Cir. 1998), *cert. denied*, 525 U.S. 973 (1998). Finally, the First and Eleventh Circuit approaches have not attracted the scholarly attention granted to *Hollingsworth II*. *See, e.g.*, Lori J. Rankin, Casenote, *Entrapment: A Defense for the Willing, Yet Unready, Criminal?*, 63 U. CIN. L. REV. 1487 (1995); Elliot Rothstein, Note, *Criminal Law* — United States v. Hollingsworth: *The Entrapment Defense and the Neophyte Criminal — When the Commission of a Criminal Act does not Constitute a Crime*, 17 W. NEW ENG. L. REV. 303 (1995). These notes both side against the *Hollingsworth II* majority. They summarize and evaluate the arguments proffered by the *Hollingsworth II* dissent and other dissenting courts but do not provide any further analysis of the readiness requirement.

13. 971 F.2d 317 (9th Cir. 1992) (finding entrapment where a sting led to the unlawful possession of narcotics with intent to distribute); *see also Thickstun*, 110 F.3d at 1396 (siding with the *Skarie* method of analysis and affirming a conviction for bribing an Internal Revenue Service ("IRS") agent).

14. *See Skarie*, 971 F.2d at 320. The Ninth Circuit has further held that "the most important factor is whether the defendant demonstrated reluctance to engage in the crime which was overcome by repeated government inducement." United States v. Citro, 842 F.2d 1149, 1152 (9th Cir. 1988) (affirming a conviction for conspiracy and attempting to use counterfeit access credit cards).

15. Within the text of this Note, all references to *Hollingsworth* refer to *Hollingsworth II* unless otherwise noted.

16. Although the majority never explicitly listed or examined any of the factors, it appeared to endorse the five-factor test set forth in *Skarie*. *Hollingsworth II*, *supra* note 2, 27 F.3d at 1205 n.1 (Coffey, J., dissenting) ("Our circuit examines five criteria to determine predisposition: '(1) the character or reputation of the defendant; (2) whether . . .' "). *See* Thomas G. Briody, *The Government Made Me Do It — The Changing Landscape on the Law of Entrapment*, R.I.B.J., March 1997, at 16.

17. The Seventh Circuit first announced this requirement in *Hollingsworth I*, *supra* note 7, 9 F.3d 593, 598-99 (7th Cir. 1993) (finding entrapment where a sting led to money laundering) and affirmed it in *Hollingsworth II*, *supra* note 2, 27 F.3d 1196, 1200 (7th Cir. 1994). The Fifth Circuit has also adopted the additional factor. *See Knox*, 112 F.3d at 807 (finding entrapment where a sting led to money laundering). Recently, the Fifth Circuit, while reviewing the *Knox* decision en banc, denounced, in dicta, the readiness requirement. *See Brace*, 145 F.3d at 260.

18. Jacobson v. United States, 503 U.S. 540, 553 (1992).

fore the government establishes a criminal scheme.[19] The *Hollingsworth* court noted that circuit courts had been finding that a defense of entrapment failed in any case when the defendant was "willing," in the sense of being psychologically prepared, to commit the crime for which he was being prosecuted.[20] Thus, these courts declared defendants willing, even when it was plain that they would not have engaged in criminal activity unless inveigled or assisted by the government.[21] *Hollingsworth* reasoned that through the *Jacobson* decision, the Supreme Court intended the readiness requirement to curtail circuit courts' limitation of the entrapment defense.[22]

The *Hollingsworth* court further held that predisposition is not purely a mental state but has a readiness component as well.[23] Under *Hollingsworth*, the government must prove that "[t]he defendant [is] 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."[24] For example, in the case of crimes that demand experience or connections that cannot be presumed, such as money laundering and drug manufacturing, the government must prove that the defendant had the essential tools to commit the crime without its intervention.[25] This burden may include a showing that the defendant had prior knowledge on the art of laundering and connections to indispensable persons,[26] or in the case of drug manufacturing, an independent distribution chain for a drug manufacturing operation.[27]

This readiness element requires a showing by the government that the crime was more than a thought in the defendant's mind.[28] For in-

19. *Hollingsworth II*, *supra* note 2, 27 F.3d at 1199.

20. *Id.* at 1198 (citing to the Second Circuit's decision in *United States v. Ulloa*, 882 F.2d 41 (2d Cir. 1989), "and other decisions").

21. *Id.*

22. *Id.*

23. *Id.* at 1199.

24. *Id.* at 1200 (emphasis added).

25. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1199. In cases that do not require extraordinary experience or contacts (noncomplex or "garden-variety" crimes), such as bribery, illegal gun sales, drug dealing, and other traditional targets of stings, the court will assume ability and expect the prosecution to prove only the defendant's willingness to violate the law without extraordinary inducements to satisfy the predispositional burden. *See id.* at 1200; *see infra* text accompanying notes 108-111.

26. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1202 ("[T]o get into the international money-laundering business you need underworld contacts, financial acumen or assets, or access to foreign banks or bankers, or other assets.").

27. *See* United States v. Russell, 459 F.2d 671, 672 (9th Cir. 1972) (finding that "there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients").

28. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1199.

stance, assume an individual, Joe, desires to make money, even if it means laundering money for a fee. Joe, however, has not laundered money in the past nor does he know where to seek the necessary information or contacts for laundering money. With the readiness requirement, the court would find entrapment where the government incited Joe to launder money, taught him the procedures for laundering, and configured the proper connections. Alternatively, if the government proved that prior to government contact Joe had the knowledge, training and connections to commit the crime, the defense of entrapment would fail.

In contrast, under the *Skarie* five-factor test, Joe's entrapment defense would fail whether or not the government proved that Joe had the knowledge, training or connections to commit the crime. Since Joe was mentally prepared to launder money all along, his inability to actually launder the money would be inconsequential. Thus, under the five-factor test, the court would convict Joe despite the fact that he would never have laundered money without the government's prodding and assistance.

The Ninth Circuit, in *United States v. Thickstun*, rejected the Seventh Circuit's "readiness" element, arguing that it added a new element to the predisposition requirement.[29] The Court argued that the Supreme Court in *Jacobson* applied settled entrapment law and did not add a "positional" requirement to the entrapment inquiry. But, in the en banc re-hearing of the first *Hollingsworth* decision, the Seventh Circuit responded that they do not add, nor do they "suggest that *Jacobson* adds a new element to the entrapment defense [independent of] inducement and, most important, predisposition."[30] Rather, the readiness element clarifies the meaning of predisposition and enables courts to distinguish predisposed defendants.[31]

This Note defends the readiness requirement, contending that the Seventh Circuit interpreted *Jacobson* properly by clarifying the readiness element of the predisposition inquiry. Part I argues that the readiness requirement was formulated in *Jacobson* and is a compromise between the two enduring Supreme Court approaches to entrapment. Part II argues that although the sting is a powerful weapon of law enforcement, sting operations are inherently dangerous and the readiness requirement is the only approach that comprehensively pro-

29. United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997).

30. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1199.

31. *Id.* at 1199. *Hollingsworth II* reemphasized the subtle but crucial distinction that *Jacobson* made: that courts should look at the defendant's likelihood of engaging in criminal behavior as opposed to the defendant's eagerness in responding to the solicitation. *See* Marcus, *supra* note 6, at 230 n.158. *But see Thickstun*, 110 F.3d at 1398; *Hollingsworth II*, *supra* note 2, 27 F.3d at 1206 (Coffey, J., dissenting) (disregarding the majority's explicit views and attacking the majority for creating a new element in entrapment cases).

tects against the sting's dangers. Part III demonstrates the need to consider the readiness requirement separately from the other five factors. Finally, Part III also argues that the readiness requirement does not, in any case, overburden the government in entrapment proceedings.

I. *JACOBSON*'S READINESS: COMPROMISING THE SUBJECTIVE AND OBJECTIVE APPROACHES

Despite the Seventh and Ninth Circuits' feud over whether the readiness requirement is a necessary result of the Supreme Court's disposition in *Jacobson*, a strong argument can be made that the Supreme Court has been developing and attempting to articulate the readiness requirement ever since its first entrapment decision, with *Jacobson* serving as the culmination of this struggle. In debating their approaches to entrapment, from *Sorrells v. United States*[32] through *Mathews v. United States*,[33] the Supreme Court majorities (the "Majority") and dissents (the "Dissent") have adopted opposing views on entrapment, focusing on divergent particulars.[34] A test focusing on the five factors and the readiness requirement presents a compromise upon which both camps can settle.

Since its first entrapment decision, the Majority's approach has focused on the defendant's character and actions — the subjective approach. Under this subjective approach, after the defendant sufficiently proves improper inducement, the burden shifts and the government is required to show a defendant's predisposition to commit the crime prior to government contact; if it cannot, the defendant is acquitted and the government's misconduct is penalized.[35] In contrast, the Dissent has advanced an objective approach, focusing on overzealous law enforcement and limiting the entrapment inquiry to

32. 287 U.S. 435 (1932).

33. 485 U.S. 58 (1988).

34. Since the Supreme Court's first review of the entrapment defense in *Casey v. United States*, all of the Court's entrapment decisions have been close, magnifying the controversy surrounding this issue. 276 U.S. 413 (1928) (four dissenters); Sorrells v. United States, 287 U.S. 435 (1932) (four dissenters); Sherman v. United States, 356 U.S. 369 (1958) (four justices concur on the decision but disagree with the doctrine and advocate the objective approach); Russell v. United States, 411 U.S. 423 (1973) (four dissenters); Hampton v. United States, 425 U.S. 484 (1976) (three dissenters); Mathews v. United States, 485 U.S. 58 (1988) (two dissenters, one concurrence and disagreement with doctrine, and one justice did not take part in the decision; only five in the majority); Jacobson v. United States, 503 U.S. 540 (1992) (four dissenters).

35. *See Jacobson*, 503 U.S. at 548-49; *see also* United States v. Brown, 43 F.3d 618, 623 (11th Cir. 1995). In *Hampton*, Justice Powell went so far as to pronounce a per se rule that, "no matter what the circumstances, neither due process principles nor [the Court's] supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." Hampton v. United States, 425 U.S. 484, 495 (1976) (Powell, J., concurring).

the government's actions. Under the objective approach, after proof of inducement, the burden remains with the defendant to further prove improper government conduct. Because the sole focus of the objective approach is on the conduct of the police, if the defendant proves improper conduct, the court will find entrapment.[36]

The choice of approach affects the likelihood of conviction. Under the Majority's subjective approach, the government may rebut a showing of inducement with proof of predisposition, whereas under the Dissent's objective approach it may not. Therefore, under the objective approach, if the government's inducement is improper, it is impossible for the government to secure a conviction. In contrast, under the subjective approach, even if the government improperly induced the defendant, the government can obtain a conviction by showing the defendant's predisposition. As a result, the likelihood of a conviction in similar circumstances is greater under the subjective approach than the objective approach.[37]

Although the objective approach has never prevailed as the Supreme Court's majority view, the approach's requirement of proper inducement to obtain a conviction, and the difficulty the government should confront in cases when it presents an improper inducement, are enduring concerns. The readiness requirement alleviates these concerns by limiting the evidentiary weight given to government-induced crime through a test focusing on the defendant's ability prior to the government's appearance.

In *Jacobson*, the Supreme Court effectively combined the concerns contained in the subjective and objective approaches in its predisposition doctrine. The doctrine addresses the dissent's concern for improper government conduct by placing a heavy burden on the gov-

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36. *See Sorrells*, 287 U.S. at 459 (Roberts, J., concurring). The *Sherman* dissent put it plainly: "a test that looks to the character and the predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment." 356 U.S. at 382 (Frankfurter, J., dissenting).

37. Critics have argued that the two approaches would reach a different result only in the case when the police reasonably, but incorrectly, believe the defendant to be predisposed at the time that the inducement is offered. *See* Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 215-16 (1976). Under the subjective approach, because the government will not be able to prove predisposition, entrapment will be found; under the objective approach, because the inducement was reasonable, and therefore proper, the defense will fail.

The strong possibility and frequency of the inverse case is overlooked by such critics. The government often presents a truly predisposed defendant with an egregious and improper inducement. *See* Marcus, *supra* note 6, at 205-11. Under the subjective approach, the inducement can be tempered and a conviction can still be obtained if the government can prove predisposition. Yet under the objective approach, a conviction is impossible.

Alternatively, it has recently been argued that the dichotomy between the two approaches is false because courts judge a defendant's predisposition to commit a crime by his reaction to government inducements, and the government's inducements are tailored to the defendant's particular characteristics. *See* Christopher D. Moore, Comment, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151, 1175-76 (1995).

ernment. *Jacobson*'s approach 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, and gives the government's behavior paramount importance vis-à-vis the defendant's mental state.[38] The government's burden of proving predisposition under *Jacobson* is heavier than the burden as interpreted by *Skarie*, presented in the five-factor test. Thus, *Jacobson*'s standard comes closer to the weighty burden of the objective approach.

A textual analysis of the debate between the *Jacobson* majority and dissent confirms the intent of the *Jacobson* majority. In *Jacobson*, the majority and dissent explicitly disagreed about whether the government must prove that the defendant was predisposed to commit a crime prior to being approached by government agents or as of the time government agents first became involved with the defendant.[39] Underlying this conflict was the broader issue of whether proof of the defendant's willingness or enthusiasm to commit the crime is enough to defeat an entrapment defense or whether the government must prove more. In the case of complicated crimes, which *Jacobson* was not,[40] the "more" is proof of readiness.

At oral argument, the *Jacobson* Court asserted, and the government conceded, that upon a showing of inducement, the government "must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to first being approached by Government agents*."[41] In contrast, the *Jacobson* dissent argued that the Supreme Court has always held that predisposition is assessed *as of the time the government first suggested the crime*.[42] The difference in time is quite critical. The majority's requirement advocates an inquiry into whether the crime resulted from the undercover agent's actions or purely from the defendant's prior inclinations, contacts and resources.[43] Under this query, evidence from events occurring prior to the government's initial contact with the defendant has much greater

38. By requiring the government to prove that the defendant was disposed prior to first being approached by the government, the Court, although not explicitly, made a push toward a test incorporating the spirit of the five factors and the readiness requirement. Although conceived of earlier, this test was first fully defined in Marcus, *supra* note 6, at 234.

39. *Jacobson*, 503 U.S. at 556-57.

40. *Jacobson* involved the unlawful receipt and possession of child pornography, a garden-variety crime that does not require prior training, experience, or acquaintances for its commission. For a discussion of why the readiness requirement does not get snagged on garden-variety cases, see *infra* Part III.

41. *Jacobson*, 503 U.S. at 549 (emphasis added) (distinguishing between garden-variety crimes and more elaborate sting operations).

42. *Id.* at 556-57; *see also* Sherman v. United States, 356 U.S. 369, 372-76 (1958); Sorrells v. United States, 287 U.S. 435, 442 (1932).

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

weight[44] than that given to events occurring during the government's operation.[45] The dissent disagreed. It examined the defendant's reactions to the government's solicitations, from the time following the initial conversation until the commission of the crime, as evidence of predisposition.[46]

Arguably, by establishing the "prior to first being approached" requirement, *Jacobson* directs the government to prove that before its initial contact with the defendant, the defendant would and could have committed the crime.[47] The majority's test seems to require the government to demonstrate that all the elements for the full commission of the crime were in place before the government entered onto the scene, which would necessarily include proof of a defendant's mental and physical ability to commit the crime.[48] The structure of the majority's test indicates that a person who is not predisposed, mentally and positionally, "is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character."[49]

On the other hand, the dissent's test, which asks the government to prove predisposition from the time the government first suggested the crime, penalizes the defendant for any influence the government may have had on the defendant from the time between the initial contact and the time that the government finally suggested the crime. That influence, when manifested in the defendant's reaction to the government's eventual offer to commit the crime, is counted against the defendant and can be used to prove predisposition.[50]

Alternatively, the *Jacobson* test may be explained as requiring the government to prove that but for the government's influence, the de-

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44. *See id.* (pointing out that preinvestigation proof of the defendant's previous receipt of child pornography, before it was a criminal offense, is "scant if any proof of . . . predisposition," it "merely indicates a generic inclination to act within a broad range, not all of which is criminal, [and] is of little probative value in establishing predisposition").

45. *See id.* at 551 n.3 (arguing that predisposition must be proven independently of the defendant's reaction to the government's coaxing).

46. *See id.* at 555.

47. *Id.* at 550 (focusing on whether preinvestigation evidence indicates more than merely "a generic inclination to act within a broad range"); *see also id.* at 557 (O'Connor, J., dissenting) (clarifying the ramifications of the majority's test by stating that "the Government must have sufficient evidence of a defendant's predisposition before it ever seeks to contact him") (emphasis omitted).

48. *Id.* at 553 (stating that the prosecution's failing was that the defendant was only "ready and willing to commit the offense . . . after the Government had devoted 2 ½ years to convincing him" to commit the offense).

49. *Hollingsworth I*, *supra* note 7, 9 F.3d 593, 598 (7th Cir. 1993).

50. *Jacobson*, 503 U.S. at 556-57 (O'Connor, J., dissenting) (disagreeing with the majority's holding that "the Government must prove not only that a suspect was predisposed to commit the crime before the opportunity to commit it arose, but also before the Government came on the scene").

fendant would have committed the crime.[51] The natural extension of the 'but for' test is that in the case of complex criminal acts,[52] such as money laundering[53] and illegal substance production,[54] when training, experience, occupation or acquaintances are vital to the commission of the crime, the government must prove that even absent its 'help' the defendant was ready and able to commit the crime. Proof of ability is crucial; without it, no court can confidently state that a defendant would have committed a crime absent government inducement.[55] When the crime is one that does not require any specialized knowledge, however, such as the sale of illegal substances, the government is absolved of this burden.[56] The purpose of the "prior to first being approached" requirement is to obligate a showing of the defendant's readiness and ability to commit the act without governmental instruction or contacts.[57]

The disposition of the *Jacobson* dissent indicates that the majority's standard entails the readiness requirement. The dissent understood that the majority's rule advocated a readiness requirement, and therefore argued that the Supreme Court has always held that predisposition is to be assessed *as of the time the government first suggested the crime.*[58] The dissent wanted to disregard any influence the government had on the defendant until the time of the suggestion of the crime and stressed only the defendant's ability after having been presented with the government's suggestion of crime.[59] The "prior to first being approached" standard demonstrates an emphasis on a defendant's background predating the initial contact with the government which may be couched as the readiness requirement.[60] This result em-

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51. *See supra* notes 38-39 and accompanying text.

52. The crimes that comprise this set of "complex criminal acts" will constantly change in accordance with the level of training, experience, occupation and acquaintances needed to commit specific crimes.

53. In *Hollingsworth II* the government connected two financiers to the world of international money laundering, and provided them with the proper underworld contacts, financial acumen and assets, and access to foreign banks and bankers. *See Hollingsworth II*, *supra* note 2, 27 F.3d 1196, 1202 (7th Cir. 1994).

54. *See* United States v. Tobias, 662 F.2d 381, 384 (5th Cir. 1981), *cert. denied*, 457 U.S. 1108 (1982) (involving illegal substance production where entrapment was found).

55. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1202.

56. *See infra* note 108.

57. This test does not require pre-contact proof of the defendant's mental predisposition because mental predisposition is always proven through circumstantial evidence procured during the sting, including the defendant's reaction to the government's offer. *See* United States v. Gendron, 18 F.3d 955, 962 (1st Cir. 1994) (noting the importance of considering the present circumstances in determining the mental predisposition of the defendant).

58. Jacobson v. United States, 503 U.S. 540, 556-57 (1992) (O'Connor, J., dissenting).

59. *Id.* at 556-57.

60. *Id.* at 553.

bodies the majority's desire for a government showing of the defendant's ability to commit the crime absent government intervention, which validates the sentiments of the objective approach and stresses the government's showing of proper inducement.

II. THE READINESS REQUIREMENT IS NEEDED TO PREVENT THE DANGERS OF STING OPERATIONS

The Supreme Court has recognized that a delicate balance must be maintained between the goals of the criminal justice system and law enforcement's weapons against crime.[61] When its arsenal is used in an improper manner or at an improper time, the justice system's goals are not furthered and people's rights are often violated.[62] One such weapon is the sting. The readiness requirement operates as the sting's safety lock, securing careful use of this law enforcement tool. Section II.A argues that an overzealous sting is contrary to public policy due to the inherent risks posed by sting operations and that the readiness requirement properly curbs such zeal. Section II.B argues that without the readiness requirement, the possibility of other forms of sting abuse arises.

A. *The Riskiness of Stings Without the Readiness Requirement*

The sting operation is designed to catch predisposed defendants in natural circumstances, but the government can easily fail to simulate reality, either accidentally or purposefully.[63] Therefore, the sting should be used with caution. To this end, the readiness requirement ensures that the government, when planning a sting operation, will consider whether it will later be able to meet its readiness burden. Moreover, the polar results possible in entrapment cases — conviction and thereby reward to the government on a successful sting or acquittal and penalize the government for an operation gone bad — further demand careful policing of sting operations and therefore advocate a readiness requirement. The systematic preference to free a criminal rather than wrongfully convict an innocent party, articulated by

61. *See* Sorrells v. United States, 287 U.S. 435, 441-42 (1932) (recognizing that the same elements of the sting that enable it to further the goals of criminal justice lend to the ease of its misuse).

62. *See* Sherman v. United States, 356 U.S. 369, 376 (1958) (discussing a narcotics sting on a drug rehabilitation patient, and commenting that it is improper for the government to "play[] on the weaknesses of an innocent party and beguile[] him into committing crimes which he otherwise would not have attempted").

63. *See* Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) (pointing out that either accidentally or purposefully, the government, in its zeal to catch and punish, may provoke or create a crime and then seek to punish the criminal, its own creature).

Justice Holmes and quoted in the opening paragraph to this Note, further supports the challenging governmental burden of the readiness requirement.[64]

The risks of sting use are numerous. The comment to § 2.13 of the Model Penal Code (Entrapment)[65] states that "the chief aims of criminal law are to prevent people from engaging in socially harmful conduct and to instruct them in the basic requirements of good citizenship."[66] In every sting there is a risk of offense by the innocent and a fostered increase in the criminal population. Undoubtedly, "[s]ome persons will ... turn to crime and risk the pain of punishment in response to the call of law enforcement."[67] Second, when government agents are engaged in persuading citizens to commit criminal acts, they are neglecting their proper task of apprehending those offenders who act without encouragement.[68] Third, the sting can easily be used by police officers to express personal malice through selective or malicious prosecution.[69] Finally, and most tragic, is the possibility of injuring the reputation of law enforcement institutions by employing methods shocking to the moral standards of the community.[70] All these concerns point in favor of a stern governmental burden that will cue the government to think twice before planning a sting.

Under the federal government's own guidance, a sting operation should not furnish to the target goods and services that otherwise would be reasonably unavailable to him. Initially, the Attorney Gen-

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64. *See* Moore, *supra* note 37, at 1187 ("[E]ntrapment was a public policy decision made by the Supreme Court in the guise of implied legislative intent." The defense is supported by a decision that "it is more important to acquit otherwise guilty people than to incarcerate them."). The Court has always based its endorsement of the entrapment defense on assumed congressional intent and public policy. *See* United States v. Russell, 411 U.S. 423, 435 (1973) (noting that the entrapment defense is rooted "in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government"); *Sorrells*, 287 U.S. at 450.

65. Because entrapment is a common law defense, there is no statutory definition for it. A proposed statutory entrapment defense was organized but is not codified. *See Undercover Operations Act: Hearing Before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 98th Cong. 19-20 (1984) [hereinafter *Undercover Operations Act Hearings*] (proposed 18 U.S.C. § 16). The proposed statutory defense substituted an objective test for the current judicially accepted subjective test. *See id.* at 28.

66. MODEL PENAL CODE § 2.13 commentary at 407 (1982).

67. *Id.* at 406.

68. *See id.*; *see also Undercover Operations Act Hearings*, *supra* note 65, at 4 (statement of Senator Patrick Leahy) ("We need a bill because we need guidelines that will protect individual citizens from the excessive zeal of an operation that wanders from its rightful goal and places the value of apparent success over the value of individual liberty and privacy.").

69. *See* MODEL PENAL CODE § 2.13 commentary at 406.

70. *See id.*; *see also* United States v. Gendron, 18 F.3d 955, 971 (1st Cir. 1994) (Pollack, J., concurring) (commenting that just because methods pursued by government agents to offer a tempting opportunity to commit a crime are successful and are found lawful "does not ... signify that those methods ... are something to be proud of").

eral's Guidelines on FBI Undercover Operations (the "Guidelines") emphasizes that "[e]ntrapment should be scrupulously avoided."[71] Furthermore, the Guidelines instruct that disposition exists when "there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of similar type."[72] The proposed Undercover Operations Act, which would establish standards for conducting federal undercover operations, moves a step beyond the Guidelines and provides that a defendant cannot be prosecuted if the undercover officer "suppl[ies] an item or service that would be reasonably unavailable to [the] criminal actor . . . but for the participation of the Government."[73] The readiness requirement appropriately addresses these concerns by requiring the government to prove that the target had attained everything to commit the crime prior to the government's appearance, except for the opportunity to commit the crime.

In conformity with the Guidelines, Congress has, in the past, proposed full acceptance of an irrebuttable affirmative statutory defense of inducement that effectively substitutes "an objective test, for the subjective 'predisposition' test."[74] The Subcommittee on Criminal Law of the Committee on the Judiciary (hereinafter the "Subcommittee") explained that the proposed Undercover Operations Act seeks to deter the worst potential abuses of the undercover technique and the overreaching tactics sometimes used in sting operations.[75] Recognizing the apparent danger in sting operations, in its latest proposed draft of the Undercover Operations Act (proposed 18 U.S.C. § 16), the subcommittee discouraged undercover agents from commencing stings by prohibiting the use of undercover agents in preliminary inquiries when there is not a reasonable suspicion of wrongdoing.[76] Such a rule reflects the same spirit as the readiness requirement.

Although the sting has numerous potentially severe pitfalls that the government has tried to avoid statutorily, if the power that creates such weighty negative effects is harnessed properly, an extremely effective tool of law enforcement can be created. Ideally, the sting op-

71. *See* Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980), *reprinted in* S. REP. NO. 97-682, at 550 (1982) (applicable only to federal law enforcement authorities).

72. *Id.* at 551.

73. *Undercover Operations Act Hearings*, *supra* note 65, at 12.

74. *Id.* at 27.

75. *See id.* at 25.

76. *See id.* at 33.

eration should advance one of law enforcement's primary goals: crime prevention.[77]

The advantages of the sting, and specifically, the advance of criminal prevention, can be seen most clearly in the context of a drug bust. The drug bust is the most common form of police solicitation or assistance to commit a crime.[78] In a bust, the police send an undercover agent to buy narcotics from a drug dealer who is then prosecuted for possession of an illegal substance with the intent to sell. In this scenario, and in all other stings, the court punishes a defendant for a harmless act, since the narcotics are taken by the undercover agent into police custody. Prevention, therefore, must be the rationale behind the sting operation. While the sale to the undercover agent is harmless, "it is altogether likely that the dealer, unless prevented, will make illegal sales" to others, spreading the dangers of drug use and the drug trade.[79]

The presumption that criminals caught through sting operations would have acted in the same manner if a private individual presented the same opportunity ("realistic circumstances") enables courts to conclude that a proper sting operation can achieve prevention.[80] Therefore, the Supreme Court has instructed that "in holding out inducements [the government] should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations."[81]

In the spirit of prevention, the execution of a sting operation has four advantages over the alternative of waiting until the crime is actu-

77. *See* Sorrells v. United States, 287 U.S. 435, 444 (1932) (declaring the sole purpose of a sting to be the prevention of crime). The Court proceeded to condemn the practice of inciting and creating crime for the sole purpose of prosecuting and punishing it. The Court reasoned that such motives were contrary to the public policy of reducing the number of crimes and criminals. *See id.*

78. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1220 (1985).

79. *Id.*

80. *See* United States v. Gendron, 18 F.3d 955, 962-63 (1st Cir. 1994); *see also Hollingsworth II*, *supra* note 2, 27 F.3d 1196, 1199 (7th Cir. 1994) ("[T]he [G]overnment may not, in trying to induce the target of a sting to commit a crime, confront him with circumstances that are different from the ordinary or typical circumstances of a private inducement."). Chief Justice Warren's oft-quoted aphorism that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," Sherman v. United States, 356 U.S. 369, 372 (1958), can be seen in two lights. Most often this quote is used to buttress the proposition that a defendant must be ready and willing to commit the charged crime before the government offers the inducement. Yet, the same words can be used to argue that the government's tactics must also be of the "ready and willing" type normally encountered on the street. In essence, this Note argues that both aspects of the crime must be of the ready and willing type — the nature of the inducement and the position of the induced — if the conviction is to withstand a defense of entrapment.

81. Sherman v. United States, 356 U.S. 369, 384 (1958).

ally committed on the public: (1) safety, (2) cost, (3) administrative ease, and (4) the apprehension of violators of victimless crimes.[82] The sting is a device that makes it safer to catch criminals.[83] The government and the undercover agent control, and are the lone characters in, the fiction that assures that either a criminal will be caught, or if not, that at least no member of the public will be hurt. A true crime, where the government exercises less control, presents the danger that the criminal will not be caught and that an innocent person will be harmed. Furthermore, a sting is a cheaper and easier method of catching a criminal than is apprehending a criminal in his ordinary criminal activities. If the government is correct in assessing the defendant's criminal inclination, it can direct the criminal's every move rather than anticipate it, rightly or wrongly.[84] Finally, the sting circumvents a dilemma posed by the victimless crime, an obstacle to traditional law enforcement.[85] In victimless criminal activity involving drugs or corruption, no direct participant wants the crime detected. Because direct participants are often the only ones with knowledge of the crime, it is difficult for law enforcement agencies to obtain knowledge of the crime, prevent it, and punish the actors. In the case of a sting, the government is a unique direct participant who wants the crime detected.

In sum, the sting is a powerful but dangerous device of law enforcement and its use should be limited. The readiness requirement draws the court and the government closer to ensuring that sting operations nab only predisposed violators of the law. Requiring proof of readiness presents the government with the difficulty of clarifying the line between the government's inducement and the defendant's own means.[86] This requirement and resulting difficulty would decrease the chances of a case of improper inducement meeting full proof of predisposition by the government. Under current entrapment doctrine, the option of both convicting a defendant who pleads entrapment and somehow punishing the government for an improper inducement does not exist. Therefore, if the government improperly procured a defendant's actions through a sting, and the defendant's readiness to commit the crime without government involvement is questionable, courts

82. *See* Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring in judgement); United States v. Russell, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting); United States v. Gendron, 18 F. 3d 955, 961 (1st Cir. 1994); Posner, *supra* note 78, at 1220.

83. *See* Posner, *supra* note 78, at 1220.

84. *See id.*

85. *See Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring in judgment); *Russell*, 411 U.S. at 445 (Stewart, J., dissenting) (pointing out that absent the sting, "many crimes, especially so-called victimless crimes, could not otherwise be detected").

86. Without this requirement, the burden falls on the defendant to prove that the inducement was too strong and created the crime.

should prefer acquittal and reprimand. In light of that preference, the readiness requirement more definitely ensures conviction of a would-be criminal than the five-factor test alone.

B. *Readiness Takes the "Sting" Out of Entrapment*

The readiness requirement, unlike the five-factor test, ensures that when a defendant is "stung" under unrealistic circumstances, entrapment is found.[87] The five-factor test does not account for cases in which the government fails to simulate reality, and thus lures a defendant who is not predisposed into criminal activity.

There are three ways the government may entrap a defendant. The first possible failing of a sting is over-inducement, where the defendant is almost forced to commit the crime.[88] The second possible failing is the entrapment of a first-time criminal.[89] The third failing is the punishment of bad thoughts rather than of the predisposition to commit a crime.[90] The five-factor test protects against conviction in the first two cases, but erroneously convicts the third class of defendants.[91] The readiness requirement is vital to protect defendants with bad thoughts but no predisposition from conviction.

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87. *See Hollingsworth II*, *supra* note 2, 27 F.3d 1196, 1199 (7th Cir. 1994) ("[T]he government may not, in trying to induce the target of a sting to commit a crime, confront him with circumstances that are different from the ordinary or typical circumstances of a private inducement.").

88. *See* United States v. Knox, 112 F.3d 802, 808 n.11 (5th Cir. 1997), *aff'd en banc sub nom.* United States v. Brace, 145 F.3d 247 (5th Cir. 1995), *cert. denied*, 525 U.S. 973 (1998) (noting that the government's inducement was similar to the price for money laundering but gave the defendants interest-free use of millions of dollars for several years, with low monthly payments and a large balloon payment); United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982) (en banc).

89. *See* Sherman v. United States, 356 U.S. 369, 375 (1958); Sorrells v. United States, 287 U.S. 435, 440 (1932). There is a special sympathy and hesitation for the conviction of first-time offenders who are caught by a sting. In light of this, the government must have reason to conduct a sting before commencing a sting on a never-before convicted person. The apprehension of a first-time offender by means of a sting automatically evokes questions about the defendant's character.

90. In *Jacobson* the Supreme Court plainly stated that the aim of sting operations is not to test and punish the target's morals; "a person's inclinations and 'fantasies . . . are his own and beyond the reach of government . . . .' " Jacobson v. United States, 503 U.S. 540, 551-52 (1992) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)).

These three flaws are not mutually exclusive; a case could be unsavory for one or more reasons. In *Jacobson*, where the government coerced an Indiana farmer for two and a half years to purchase child pornography, all three flaws were present. The government imposed extreme measures by coercing Jacobson for 30 months; Jacobson was a first-time offender (this was his first time purchasing child pornography since the enactment of the Child Protection Act of 1984, which made receipt of child pornography through the mail for noncommercial use a crime). The government created unrealistic circumstances by appealing for the same cause through five fictitious organizations, ranging from sexually related retail companies to research and legislative organizations to a bogus pen pal. *See id.* at 543.

91. *See* United States v. Skarie, 971 F.2d 317, 320 (9th Cir. 1992). Under the five-factor test, when the government employs excessive measures (the first category of entrapment) to

The third type of entrapment occurs in cases in which the government presents a defendant with circumstances that defy reality.[92] As stated previously, the purpose of a sting operation is to catch predisposed criminals in circumstances that harm no one. Therefore, if the sting eliminates inevitable harm, it logically follows that the proper target of a sting, a predisposed criminal, is someone who has at least the ability, if not the will, to commit the crime at the moment of inducement or soon afterward. Otherwise, the defendant could not be considered harmful.[93] Accordingly, a sting operation that furnishes the defendant with education, contacts, or tools vital to the crime that the defendant could not readily come by on his own, does not reveal a defendant's predisposition to the crime; it only reveals his bad thoughts.[94] Moreover, to punish such a defendant would be punishing him for bad

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pressure a defendant to commit a crime, there is a rebuttable presumption of entrapment supported by the nature of inducement and the defendant's limited reluctance to the crime — factors (4) and (5) of the five-factor test. *See id.* The government may rebut this presumption through evidence that the criminal has previously engaged in similar criminal acts, first suggested the criminal activity, or engaged in the activity for profit — factors (1), (2), and (3). *See id.* The purpose of accounting for the extreme nature of the inducement is to ensure that the government is not turning an investigation of whether the defendant is breaking the law into an investigation of whether the defendant can be induced to break the law — an improper motive for a sting. *See* Posner, *supra* note 78, at 1220 ("Police inducements that merely affect the timing and not the level of criminal activity are socially productive; those that increase the crime level are not.").

With regard to the second category of entrapped defendants, the five-factor test requires consideration of a defendant's character and whether the defendant demonstrated reluctance to commit the crime. *See supra* notes 7, 14.

92. *See Hollingsworth II*, *supra* note 2, 27 F.3d 1196, 1199 (7th Cir. 1994).

Suppose that an undercover government agent, with knowledge that someone (Joe) holds a foreign banking license, but with no knowledge of whether Joe has previously laundered or desires to launder money, approaches Joe and asks him whether he would like to make money as a money launderer. Joe answers, "Sure, but I don't know anything about laundering." In response, the government agent agrees to instruct Joe on how to use his foreign license to launder money; to connect him to underworld contacts, foreign banks and bankers, and to feed Joe the financial acumen and assets needed to commit the crime of laundering. *See id.* (presenting a similar scenario in a counterfeiting case). For those undecided about whether Joe should have a valid entrapment defense, consider *Hollingsworth II* where even the government's lawyer admitted that "the counterfeiter would have a strong case that he had been being entrapped, even though he was perfectly willing to commit the crime once the government planted the suggestion and showed him how and the government neither threatened him nor offered him an overwhelming inducement." *Id.*

93. Bad thoughts are never harmful in the context of active crimes. *See id.* ("Predisposition is not purely a mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. . . . [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.").

94. For example, to get into the international money-laundering business, you need underworld contacts, financial acumen or assets, or access to foreign banks or bankers. *See id.* at 1202. Drug manufacturing demands scientific knowledge, equipment and chemicals. *See* United States v. Russell, 411 U.S. 423, 425 (1973).

thoughts rather than for a bad act — a result that is at odds with principles of criminal justice,[95] and that is not the government's function.[96] Law enforcement's proper use of criminal law in a progressive society is to regulate potentially harmful conduct for the protection of society; not to purify minds and perfect character.[97] Therefore, a sting must be based on a defendant's ability to do harm rather than simply on bad thoughts — exactly what readiness requires.

Cases in which the government induces a defendant in ways different from reality are not covered under any of the Ninth Circuit's five factors. The readiness requirement compels the government to establish that a defendant's commission of the crime occurred under realistic circumstances — the only proper way to catch criminals without first allowing them to harm the public.[98] The readiness requirement of predisposition must be embraced to keep sting operations functioning properly, free from concern about an erroneous conviction.

III. THE READINESS REQUIREMENT DOES NOT OVERDETER GOOD LAW ENFORCEMENT

Contrary to the assertion of the *Hollingsworth* dissent and other courts that have since disagreed with the *Hollingsworth* majority, the readiness requirement does not overdeter good law enforcement.[99] It operates with precision, releasing criminals who submit to unrealistic circumstances while convicting those criminals who are caught through sting operations that simulate reality. The readiness requirement does not protect defendants who have the means to commit the crime or would probably have been presented with such means by a private citizen. The requirement is further sharpened by: (1) holding that the lack of readiness alone is not enough to establish entrapment,

95. Since its first entrapment decision, the Supreme Court has seen the purpose of the sting as limited to revealing criminal design and disclosing predisposed violators of the law, not testing defendants' morals and thresholds. *See* Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring in result) ("Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime"); Sorrells v. United States, 287 U.S. 435, 441-42 (1932); *see also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

96. *See* Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 LAW & PHIL. 17, 34 (1985) ("[This is] an interesting piece of data for God, but not for the FBI."). A person who has dreams of criminality, but has no means of living them, is harmless and must be left alone. *See id.*

97. *See id.* at 33-34.

98. The defendant is predisposed if he would have committed the same crime, in circumstances that would have made it harder for the police to catch him, if he had not fallen into the police trap. There is no benefit derived from catching a person who would not have done the crime otherwise. *See* Posner, *supra* note 78, at 1220.

99. *See* United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997); *Hollingsworth II*, *supra* note 2, 27 F.3d 1196, 1211 (7th Cir. 1994) (Coffey, J., dissenting).

and (2) remaining distinct from the five factors of the Ninth Circuit. Finally, the readiness requirement does not create an impasse for conviction in garden-variety drug and arms sales or bribery cases, nor does it provide the competent criminal who pretends to be disorganized with insurance against arrest.

The readiness requirement presents the government with two options: to prove either (1) that the defendant, alone, was positionally ready and able to commit the crime, which means that the defendant had the idea for the crime all worked out, felt the desire to commit the crime, and lacked only the present means to commit it, or (2) that it is likely that if the government had not induced the defendant to commit the crime, some private party would have induced him.[100] In these two scenarios, the government simply furnishes the opportunity to commit the crime to someone already predisposed to commit it.

Realizing that the strong emphasis it put on readiness might be misunderstood, the *Hollingsworth* court qualified its position and stated that "[w]e do not wish to be understood as holding that lack of *present* means to commit a crime is alone enough to establish entrapment if the government supplies the means."[101] The government's failure to prove readiness does not automatically lead to a finding of entrapment. Therefore, a defendant who suggests the commission of a crime to a government agent and seeks out the undercover's help but personally lacks the means to commit the crime should be convicted. This is an obvious result that would be questionable under the facts presented by *Hollingsworth*, if not for the limitation on readiness.

Additionally, for the readiness requirement to be effective, it must be considered separately from the other five factors. The language used by the *Jacobson* majority to counter the dissent's argument that the majority created a new factor may foster the belief that the majority only added a sixth readiness factor to the existing five-factor test, and did not intend readiness to be an element separate from the five-factor test.[102] This must be incorrect. The inquiry into readiness must be separate from the five-factor test because without proof of readiness, a court cannot find a defendant predisposed. If readiness were merely a sixth factor, courts could easily mitigate its importance by

100. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1200, 1203. Proof of probability of private intervention is not needed in cases in which the government did not need to provide means to the defendant for commission of the crime, due to the defendant's prior acumen or the simplicity of the crime.

101. *Id.* at 1202.

102. *See id.* at 1199-1200. This Note contends that although readiness is not a new element added to the entrapment defense, it is a factor to be evaluated separately from the five factors, and it is to be allotted distinct weight.

emphasizing the other factors in their analyses. The five factors are balanced, whereas readiness is indispensable.[103]

The Seventh Circuit stated that it did not interpret *Jacobson* to add a new element to the entrapment defense on top of inducement and predisposition.[104] But the Seventh Circuit did not clearly state whether the proof of readiness is to be considered separately from the five factors or simply as a sixth factor. This distinction would determine whether or not proof of other factors could outweigh the government's failure to meet the burden of the readiness requirement. If readiness is nothing more than a sixth factor, proof of other factors could easily compensate for the government's failure to prove readiness. In contrast, if readiness is an independent factor that is given more weight than any of the five factors, a very strong showing of predisposition from the five factors would be needed to compensate for the absence of readiness proof.

The *Hollingsworth* court plainly stated,

> [t]he 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.[105]

Therefore, although readiness may not be a "new element to the entrapment defense," the readiness requirement must be an element of the predisposition inquiry that is independent from the five factors and imperative to overcoming an entrapment defense. Even though lack of readiness alone is not enough to establish entrapment if the government supplies the means, under *Hollingsworth* a defendant cannot be convicted when the defendant raises a colorable defense of entrapment and readiness is not shown.[106] A "colorable case" is when some of the other factors indicate, even if not conclusively, a lack of predisposition.[107]

Although the readiness requirement burdens the government with proof of present means or likely inducement by another, it does not create an insurmountable burden in garden-variety drug, arms, and

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103. *See* Rothstein, *supra* note 12, at 327 (describing the Seventh Circuit's use of the readiness factor in *Hollingsworth* as a separate and independent prong of the entrapment analysis). Rothstein argues that if the *Hollingsworth* court used the readiness requirement as one of the several factors pertinent to the predisposition analysis and not as a separate element, the other factors would have clearly demonstrated the existence of predisposition. *See id.*

104. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1199-1200.

105. *Id.* at 1200 (emphasis added).

106. *See id.* at 1203.

107. *See id.*

bribery cases.[108] Commission of crimes like these, which do not demand any technical or particular training, experience, occupation, or acquaintances, can be characterized as crimes that the defendant implicitly has the readiness to commit. Indeed, because these crimes do not have any technical demands, everyone has readiness to commit them. This idea was expressed by the Supreme Court in *Jacobson*: "In such a typical case . . . 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."[109] Specifically, "[a] public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales."[110] In such cases, when readiness is assumed, mental predisposition is all that the government needs to show.[111]

Finally, in non-garden-variety cases, the readiness requirement does not provide arrest insurance for the competent criminal who is sufficiently studied in his way of doing business so as to appear unorganized and therefore reliant upon the government's means.[112] Readiness simply forces the government to be alert when fashioning the sting. Theoretically, an expert criminal could make himself seem reliant on government means and therefore entrapped. But this argument assumes that the criminal somehow knows that he is the focus of a sting operation. Otherwise, why would he pretend to be reliant?[113]

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108. In *Thickstun* the court rejected the readiness requirement and argued that "[s]uch a rule would be especially problematic in bribery cases. A person is never 'positionally' able to bribe a public official without cooperation from that official." 110 F.3d 1394, 1398 (9th Cir. 1997). The *Hollingsworth I* dissent made the same argument in reference to the sale of narcotics. *See Hollingsworth I*, *supra* note 7, 9 F.3d 593, 605-06 & n.7 (7th Cir. 1993) (Ripple, J., dissenting).

The Supreme Court in *Jacobson* and the Seventh Circuit in *Hollingsworth* have dismissed this argument, stating that through the criminal act itself, the defendant demonstrates his ability to commit the crime. *See* Jacobson v. United States, 503 U.S. 540, 549-50 (1992); *Hollingsworth I*, *supra* note 7, 9 F.3d at 601. Unfortunately, due to the prevalence of bribe takers and drug sellers and buyers, defendants are always positionally able to bribe and conduct transaction involving drugs; whether the defendant can identify a particular taker or buyer at the moment is inconsequential.

109. 503 U.S. at 549-50.

110. *Hollingsworth II*, *supra* note 2, 27 F.3d at 1200. Whether a seasoned or occasional drug trafficker is involved, the government does not have a readiness requirement in drug cases.

111. *See id.* at 1200. In addition, the court in *Hollingsworth I* correctly concluded that the readiness requirement "has no implications at all for the garden-variety drug cases in which the defense of entrapment is most frequently, but futilely, raised." *Hollingsworth I*, *supra* note 7, 27 F.3d at 601.

112. The "first-rate arrest insurance" argument was made by Judge Ripple in his *Hollingsworth II* dissent. *See Hollingsworth II*, *supra* note 2, 27 F.3d at 1217 (Ripple, J., dissenting).

113. The argument that the defendant may simply be covering his bases defies logic. That argument assumes that the defendant always covers his bases, because he does not

Furthermore, even assuming that a defendant is a constant actor, if the government cannot prove readiness, how could we be sure that the defendant is a seasoned criminal and not a reliant first-timer? In such cases, we should return to Justice Holmes's early preference for freeing a criminal rather than wrongfully convicting an innocent party, and the "actor" is acquitted.

CONCLUSION

After 100 years, courts may finally be approaching a settlement of the confusing and morally disturbing entrapment doctrine. Imperative to this settlement is the inclusion of the readiness requirement. Critics have interpreted the revitalization of the objective approach and rise of the readiness requirement as being overly sympathetic to the entrapped defendant. But the interpretation introduced in the doctrine's early days by Justices Brandeis and Frankfurter, that the objective approach is just a shift toward closer scrutiny of government inducement, cannot be forgotten.[114]

Inducement and predisposition are two sides of the same coin, and two ways of naming the same burden, differing only as to which party bears the burden.[115] Inducement places the burden on the defendant and predisposition places the burden on the government. In light of this relationship, as an alternative to the government's burden of proving readiness, the readiness requirement could easily be recharacterized and the burden shifted to the defendant to prove that the government provided means that the defendant did not previously possess. Furthermore, the inquiries as to "who first suggested the criminal activity" and "the nature of the government's inducement" within the five-factor test seem to belong on the inducement side of the coin and should be placed on the defendant. One might argue that the defendant should be burdened with some of these factors because, in the case of an entrapment plea, the defendant has already been proven guilty of committing the crime and must now defend against his conviction.

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know when the government may present him with a sting. Always covering his bases means that for every crime, either genuine or sting, the defendant would have to appear reliant on his accomplice. This proposition is not realistic. No criminal would operate under the constant debilitation of acting reliant when he is not.

114. *See* Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring in the result) ("[A] test that looks to the character and the predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment."); Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting).

115. "[I]nducement is significant chiefly as evidence bearing on predisposition: the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question." *Hollingsworth II*, *supra* note 2, 27 F.3d at 1200.

The bare fact that these great burdens that could justly be placed on the defendant rest on the government's shoulders demonstrates that the entrapment defense inherently directs scrutiny toward the government. This heightened scrutiny may be a statement about the ethical underpinnings of law enforcement in America today — about placing safeguards on how low the government will go to get its man.