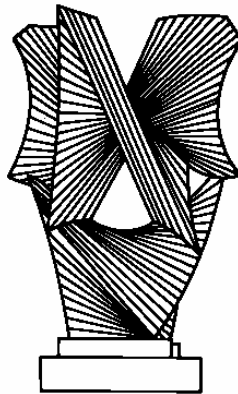


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REFORMING ENTRAPMENT DOCTRINE IN *UNITED STATES V. HOLLINGSWORTH*

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United States v. Hollingsworth

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Abstract: This short essay, written for a symposium commemorating Richard Posner's twenty-fifth year as a judge, examines Judge Posner's majority opinion for a closely divided en banc decision on the federal entrapment defense. The cases considers a fundamental issue in the meaning of the element of "predisposition." Judge Posner crafts a boldly innovative reading of the Supreme Court precedent on the topic, introducing the element of "position" or "readiness" to predisposition. I claim the result, properly understood, is to rationalize the doctrine of entrapment.

Reforming Entrapment Doctrine in *United States v Hollingsworth*

Richard H. McAdams[†]

Whenever I teach the entrapment defense, I pair the last Supreme Court case on the topic—*Jacobson v United States*¹—with the Seventh Circuit’s en banc decision in *United States v Hollingsworth*.² Chief Judge Richard A. Posner wrote the panel opinion for the 2-1 majority in *Hollingsworth*³ and the en banc opinion for the 6-5 majority, in each case holding that the two defendants were entrapped as a matter of law. Chief Judge Posner interpreted *Jacobson*—itself a 5-4 decision—as making an unannounced but fundamental change in entrapment law that benefited the *Hollingsworth* defendants. Under his view, the Supreme Court redefined “predisposition” to include not only the mental element of willingness to commit an offense, but also a positional element of being functionally able to do so.⁴

Posner’s opinions display his characteristic skill in interpretation, creatively finding space for the doctrinal change and using that space to bring, to my mind, greater rationality to entrapment doctrine. There are lively dissents written by Judges Coffey, Easterbrook, and Ripple.⁵ Since the Seventh Circuit’s en banc decision, other circuits have struggled with

[†] Professor, University of Chicago. I wrote this contribution while still serving as the Guy Raymond Jones Professor at the University of Illinois College of Law and I thank my colleagues there for many enlightening conversations over the years on the topic of entrapment. I particularly thank Jacob Corré, Margareth Etienne, Andy Leipold, Steve Heyman, and Jackie Ross for comments on this essay.

¹ 503 US 540, 542 (1992).

² 27 F3d 1196, 1203 (7th Cir 1994) (en banc).

³ 9 F3d 593, 600 (7th Cir 1993).

⁴ See *Hollingsworth*, 27 F3d at 1200. The case also decides a novel question about derivative or vicarious entrapment that I will not discuss. See *id.* at 1203–05.

⁵ See *id.* at 1205–11 (Coffey dissenting, joined by Easterbrook) (arguing that the majority misinterprets *Jacobson* and erroneously reviews the factual record in the defendants’ favor); *id.* at 1211–13 (Easterbrook dissenting, joined by Coffey) (criticizing the majority’s reliance on the defendants’ novice status and suggesting that prosecutors, not courts, should determine when a defendant is harmless); *id.* at 1213–19 (Ripple dissenting, joined by Bauer, Coffey, and Kanne, and in part by Easterbrook) (rejecting the majority opinion as departing from governing precedent and creating substantial burdens on law enforcement officials by requiring a showing of positional predisposition).

the issue but rarely resolved it;⁶ one imagines that the Supreme Court will one day decide the point, though it has shown no great eagerness to do so.

The entrapment defense potentially applies whenever a defendant commits an offense facilitated by undercover government agents. This occurs most typically in “sting operations,” where the government agent plays the role of a criminal confederate (for example, a buyer of contraband the defendant sells), but also in “decoy operations,” where the government agent pretends to be an attractive criminal victim (for example, an inebriate with cash hanging out of his pocket). Although many states have codified the defense,⁷ Congress has not. Instead, well before the state statutes existed, the Supreme Court created the entrapment defense as a matter of statutory interpretation. In *Sorrells v United States*,⁸ the Court interpreted federal criminal provisions not to apply to conduct in *certain* undercover operations, namely those where law enforcement officers “instigated” a person “otherwise innocent” to commit the offense.⁹ Thus, federal entrapment doctrine requires two elements: inducement¹⁰ and lack of predisposition.

⁶ The Ninth Circuit did reach the issue and rejected *Hollingsworth*'s positional requirement in *United States v Thickstun*, 110 F3d 1394, 1398 (9th Cir 1997) (concluding that a separate positional requirement would be “especially problematic in bribery cases,” because “[a] person is never ‘positionally’ able to bribe a public official without cooperation from that official”). A Fifth Circuit panel opinion following *Hollingsworth* was vacated en banc because the argument was not preserved for appeal. See *United States v Knox*, 112 F3d 802, 808 (5th Cir 1997) (“We recognize that the Seventh Circuit’s reading of *Jacobson* has not been universally embraced. . . . Nonetheless, we are persuaded that the Seventh Circuit’s *Hollingsworth* decision is correct.”), vac’d as *United States v Brace*, 145 F3d 247, 265 (5th Cir 1998) (en banc) (“[Positional predisposition] was not presented in this case; therefore, mindful of our limited and proper role, we do not address it.”). Other courts, including a more recent Fifth Circuit panel, have noted the issue but not decided it. See *United States v Ogle*, 328 F3d 182, 188–90 (5th Cir 2003) (finding it unnecessary to address positional predisposition where attempts by the defendant, a sophisticated businessman, to prove he was not positioned to launder money would have been fruitless); *United States v Squillacote*, 221 F3d 542, 567 (4th Cir 2000) (declining to decide the issue where the defendant was unquestionably positionally predisposed to commit the crime).

⁷ See Paul Marcus, *The Entrapment Defense* §§ 12.01–12.26 at 705–15 (Matthew Bender 3d ed 2002 & Supp 2006) (collecting the statutes of the twenty-six states that codify the defense).

⁸ 287 US 435 (1932).

⁹ *Id.* at 438–40, 448 (overturning a conviction for possessing and selling whiskey in violation of the National Prohibition Act where a prohibition agent asked the defendant three times to leave his house to get some whiskey, intending to prosecute the defendant for doing so).

¹⁰ Inducement is often defined as the government’s doing something more than merely creating an opportunity for crime, as by “persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.” *United States v Poehlman*, 217 F3d 692, 698 (9th Cir 2000), quoting *United States v Davis*, 36 F3d 1424, 1430 (9th Cir 1994). See, for example, *Sherman v United States*, 356 US 369, 371–73 (1958) (finding entrapment where a government informant faked withdrawal symptoms to induce the defendant to procure heroin to relieve the informant’s suffering). Given this understanding, inducement often effectively merges with predisposition, a point Posner made in the panel opinion. See *Hollingsworth*, 9 F3d at 597 (suggesting

The Supreme Court has characterized predisposition as the “principal” element in the defense,¹¹ and *Jacobson* and *Hollingsworth* both turn on its meaning. The concept is difficult; many cases and a vast commentary have tried to clarify it. *Hollingsworth* does not concern all aspects of predisposition, but the case does turn on a fairly fundamental choice between two possibilities: (1) that predisposition means “willingness,” a purely mental state of being willing to commit an offense at the first opportunity—what we might think of as the opposite of reluctance; or (2) that predisposition means “tendency,” which requires willingness but also ability. In *Hollingsworth*, Posner adopts the second possibility:

Predisposition . . . has positional as well as dispositional force. . . . 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.¹²

How does the choice between these definitions matter? Before moving to the facts of *Hollingsworth*, consider the following counterfeiting hypothetical Posner used to illustrate what is at stake in the choice:

Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, “Sure, but I don’t know anything about counterfeiting.” Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print

that the elements have tended to merge because the government bears the burden of showing both lack of inducement and presence of predisposition, and because stronger inducement makes it more difficult to show predisposition). If the government found it necessary to use threats, badgering, or appeals to sympathy to induce the crime, then the possibility that nothing less would suffice suggests that the defendant was not predisposed to offend. By contrast, if the one-time creation of a standard criminal opportunity prompted the defendant to offend, then the inference is that the defendant was predisposed.

Nonetheless, most federal courts continue to treat the elements as distinct. In one respect, inducement clearly is separate from predisposition—in imposing the requirement of government action. There is no entrapment defense unless government agents induced the crime. No matter how unwilling or reluctant a defendant is, no matter what pressure is brought to bear short of duress, if those who tempt him are purely non-governmental actors, there is no defense. As *Hollingsworth*, 27 F3d at 1203, puts it: “There is no defense of private entrapment.” Of course, the line between governmental and non-governmental action is not always obvious. See *id.* at 1203–05.

¹¹ *Mathews[caj] v United States*, 485 US 58, 62–63 (1988), quoting *United States v Russell*, 411 US 423, 433 (1973) (upholding *Sorrells* and *Sherman* by declining to replace predisposition with inducement as the principle element in the entrapment defense).

¹² *Hollingsworth*, 27 F3d at 1200.

the money; and then offered him \$10,000 for some quantity of counterfeit bills.¹³

Here, there is no dispute about *willingness*. At the first opportunity to counterfeit, the defendant immediately agreed to commit the criminal act. He exhibited no reluctance. If predisposition means only willingness, then this defendant was predisposed and loses the entrapment defense. By contrast, the defendant was clearly not in a *position* to commit the crime. He lacked the “training or experience or occupation or acquaintances” necessary to become a counterfeiter. Being unable without government assistance to commit the offense in the present and foreseeable future,¹⁴ he had no tendency to offend. Thus, if position or ability is required, he was not predisposed and wins the defense.

In *Hollingsworth*, the crime committed was money laundering.¹⁵ The Arkansas defendants William Pickard and Arnold Hollingsworth were, respectively, an orthodontist and a farmer/businessman. Pickard had tried a variety of business ventures—movie theaters, an amusement park, an apartment building, and the publication of cookbooks written by his wife—all of which had failed. He then undertook a partnership with Hollingsworth to become an international financier by creating a Virgin Islands corporation, obtaining two foreign banking licenses, and advertising for customers. After failing for some time to attract any customers and “steadily losing money,” Pickard placed an ad in *USA Today* to sell one of the banking licenses. The day the ad came out, a United States customs agent in Indianapolis, J. Thomas Rothrock, was attending a seminar on money laundering. Rothrock spotted the *USA Today* ad and called the listed phone number. The facts here become complex, but the bottom line is that Pickard demonstrated a clear willingness to commit the crime of money laundering, along with wariness about being detected. Over time, he took from Rothrock \$200,000 in cash Rothrock said he obtained from smuggling guns to South Africa. In exchange, Pickard wired the same amount of money, minus his fees, to Rothrock’s bank. Hollingsworth provided minor assistance.

¹³ *Id* at 1199.

¹⁴ Position does *not* require an *immediate* ability to commit the offense. See *Hollingsworth*, 27 F3d at 1202 (“We 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.”). Posner gives the example of someone who is willing and able to commit a smuggling offense except that he currently lacks a boat. Such a person lacks the present means to offend, but because boats are easy to obtain, is still in a position to do so. *Id* at 1202–03 (“[I]f the government had not supplied [the means] someone else very well might have.”).

¹⁵ See *id* at 1200–02.

Posner conceded that, on these facts, if predisposition means merely willingness, then Pickard and Hollingsworth were appropriately convicted. They were clearly willing. But after holding that predisposition also includes a positional aspect, Posner concluded that Pickard and Hollingsworth were, as a matter of law, not in a position to commit the offense: “Pickard and Hollingsworth had no prayer of becoming money launderers without the government’s aid.”¹⁶ They were therefore entitled to an acquittal.

Posner defended this conclusion, first, by describing the obstacles the defendants faced: “[T]o get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. Pickard and Hollingsworth had none.”¹⁷ Indeed, their Virgin Islands corporation had no up-and-running bank and their crude scheme to launder money—by taking cash and wiring money to Rothrock’s bank—did not make any use of their corporation or foreign bank licenses.¹⁸ Laundering money is a difficult task, given that the government devotes great resources to keeping track of money. Criminals who seek to launder cash will therefore only hire those who appear to have the skill to prevent government officials from penetrating the scheme. Given their lack of experience, expertise, and institutional assets, Posner concluded, “[n]o real criminal would do business with such tyros” as Pickard and Hollingsworth.¹⁹ “Whatever it takes to become an international money launderer, they did not have it.”²⁰ Or at least the government made no effort to prove otherwise.²¹

Given these obstacles, Posner described what would have occurred if Agent Rothrock had never begun his sting operation:

[Pickard and Hollingsworth’s] solicitations for financial business had produced a tiny investor, but no customers. Their corporation was running out of money when they placed the ad in *USA Today* for the Grenadan banking license. No one responded to the ad, except [Rothrock]. . . . Had [Rothrock] not answered the ad, Pickard would soon have folded his financial venture.

¹⁶ Id at 1202.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id at 1203.

²⁰ Id at 1202.

²¹ Id at 1203 (“[P]erhaps the government could have shown that a Grenadan banking license has no other use but money laundering and that sooner or later Pickard and Hollingsworth would have gotten into money laundering even without the government’s aid. No attempt was made to show this.”).

. . .

Our two would-be international financiers were at the end of their tether, making it highly unlikely that if [Rothrock] had not providentially appeared someone else would have guided them into money laundering.²²

In sum, however willing to offend the defendants were, had the government left them alone, it was not “even remotely likely”²³ that they would have committed the crime.

The dissenters did not entirely agree with this assessment,²⁵ but their main point was not factual but legal: that the settled law of predisposition required nothing more than a willingness to offend. If so, then all agree that Pickard and Hollingsworth lose. We can divide the legal debate between Posner and the dissenters into two topics. First, does Supreme Court precedent permit Posner’s positional requirement? Second, is the positional requirement good policy?

Both topics are wonderful opportunities for teaching. Most casebooks teach entrapment with *Jacobson*, the Supreme Court’s last entrapment case. Posner conceded that, before *Jacobson*, the courts of appeals were “drifting toward” the view that predisposition meant pure willingness.²⁶ He claimed, however, that *Jacobson* compels a different understanding. Thus, the first topic comes down to the meaning of *Jacobson*. Reading *Hollingsworth* forces the students to think deeper about the meaning of *Jacobson*, and

²² Id at 1202–03.

²³ Id at 1202.

²⁵ In particular, Judge Coffey objected to the description of Pickard as innocent in Posner’s “otherwise innocent” formulation, discussed below. Id at 1206–09 (Coffey dissenting). Judge Coffey catalogues the evidence of Pickard’s general guilt: he arguably encouraged Rothrock to structure his banking deposits illegally; he said he used a “tap light” to reveal if anyone was monitoring his phone; and when arrested, he was carrying false passports issued to the mythical “Dominion of Melchizedek.” Yet all this evidence demonstrates merely that Pickard was *willing* to commit an act he believed to be criminal. That he is “*otherwise innocent*,” (emphasis added) however, means only that he would not offend *outside* the operation, which could be true despite his willingness if he lacks the position or ability to offend. No evidence suggests that Pickard would ever have been hired by criminals to launder money. Ultimately, Judge Coffey does not claim that Pickard was positioned to offend but objects to the requirement of position.

²⁶ Id at 1198 (majority). Posner describes the pre-*Jacobson* view as follows:

[T]he 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.

Id.

possibly to develop a more sophisticated understanding of the interpretation of precedent.

In *Jacobson*, federal undercover agents spent over two years corresponding with the defendant about his sexual interests and “rights” before offering to sell him sexually explicit photographs of minors.²⁷ Jacobson, a Nebraskan farmer, had on a previous occasion purchased *Bare Boys I* and *Bare Boys II*, which contained nude photographs of preteen and teenage boys, though the material was legal at the time he purchased it. Soon after Congress changed the relevant law by enacting the Child Protection Act of 1984,²⁸ federal officials discovered Jacobson’s prior purchase and began exchanging letters with him. Postal inspectors and customs officials posed as members of five fictitious organizations (for example, the American Hedonist Society) and a “bogus pen pal,” Carl Long. In these guises, they asked Jacobson about his sexual interests and advocated the right of access to sexually explicit images of minors. After twenty-six months of such correspondence, one fictitious organization, the “Far East Trading Company Ltd.,” offered to sell Jacobson a sexually explicit magazine involving young boys. Jacobson placed an order and federal officials arrested him after a controlled delivery of the magazine to his house, where subsequent searches discovered no other pornography. A jury convicted Jacobson of violating the Child Protection Act of 1984.

By a vote of 5-4, the Supreme Court reversed.²⁹ Again, the issue was whether there was sufficient evidence to permit a jury to find that Jacobson was predisposed and thus reject his entrapment defense. Writing for the majority, Justice White held that the government failed to meet its burden of proving predisposition, finding its evidence insufficient as a matter of law. First, the pre-1984 order of child pornography did not prove predisposition because the act was at the time lawful. “Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal.”³⁰ Second, Jacobson’s “ready response” to the solicitation did not prove he was predisposed at the requisite time. Given an inducement, “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*.”³¹ Yet his willingness to offend after

²⁷ See *Jacobson*, 503 US at 542–48 (reporting the facts described in this paragraph).

²⁸ Child Protection Act of 1984, Pub L 98-292, 98 Stat 204, codified as amended at 18 USC § 2252(a)(2) (2000 & Supp 2003) (criminalizing, among other things, the receipt via interstate commerce of images of minors engaging in sexually explicit conduct).

²⁹ *Jacobson*, 503 US at 554.

³⁰ *Id* at 551.

³¹ *Id* at 549 & n 2 (emphasis added).

“26 months of repeated mailings and communications,”³² while sufficient to prove predisposition at that time, was insufficient to prove “that this predisposition was independent and not the product of the attention that the Government had directed at” Jacobson.³³

The dissent worried that this focus on the timing of predisposition might make the government’s burden too difficult.³⁴ In response, Justice White noted: “Had the agents in this case simply offered [Jacobson] the opportunity to order child pornography through the mails, and [Jacobson]—who must be presumed to know the law—had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction.”³⁵ But the federal authorities here had done much more than simply offer their target the opportunity to offend. In so doing, they created the risk of causing an “innocent” person to offend. Near the end of his opinion, Justice White concluded: “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.”³⁶

What does *Jacobson* say about the legal issue addressed in *Hollingsworth*? Does the case compel or at least permit Posner’s conclusion that predisposition has a positional element? *Jacobson* said nothing directly about these issues and gave no explicit indication that it was breaking new ground. Judge Easterbrook, dissenting in *Hollingsworth*, argued in favor of “treat[ing] the Justices as honest expositors” who would not change the rule significantly without saying so.³⁷ But Posner noted that “it is not unusual for a court to change the law without emphasizing its departures from or reinterpretation of precedent; emphasis on continuity is characteristic of common law lawmaking even when innovative.”³⁸ Posner then seized on

³² Id at 550.

³³ Id.

³⁴ See id at 557–58 (O’Connor dissenting, joined by Rehnquist and Kennedy, and in part by Scalia) (fearing that lower courts and criminal investigators would misread the majority’s rule to require evidence of predisposition before beginning a criminal investigation).

³⁵ Id at 550 (majority).

³⁶ Id at 553–54.

³⁷ *Hollingsworth*, 27 F3d at 1212 (Easterbrook dissenting).

³⁸ Id at 1198 (majority). Judge Easterbrook pointedly responds:

A relatively formal treatment of the Supreme Court’s opinions better promotes evenhanded administration of justice than does a willingness to infer change from opinions reiterating old rules. After all, what six judges of this court see in *Jacobson*, five others think a mirage. As we approach a thousand judges on the federal courts, such differences in visual acuity have the potential to transmute Norman Rockwell’s view of the world into Joan Miró’s
Id at 1212 (Easterbrook dissenting).

the last sentence I quoted above from *Jacobson*: that the courts should intervene when the government induces an offense from “*an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law.*”³⁹ Posner’s point is that a citizen can be “otherwise law-abiding” and unlikely ever to offend not only because he is unwilling to offend but also because he is unable. The counterfeiting hypothetical makes this point: a person who does not know how to counterfeit money is unlikely ever to commit the crime despite being willing to do so. Posner said the same of Jacobson: “A farmer in Nebraska, his access to child pornography was limited”⁴⁰ and, indeed, the search of his house found no evidence of any other such offenses. Thus, the quoted language and the outcome of the case imply that predisposition has a positional component.

The dissenting opinions point to different language in *Jacobson*. First, there is the holding that the prosecution must prove that the defendant was predisposed before the government first begins its inducement.⁴¹ Thus, one can read *Jacobson* as embracing predisposition as pure willingness but reversing the conviction only because the government failed to prove that the willingness existed at the requisite time, before the government approached Jacobson. On this reading, the Supreme Court did not mention the importance of position (or ability) to predisposition because it did not mean to introduce the concept into the law. To the contrary, there is Justice White’s statement that there would likely be no grounds even to instruct the jury on entrapment “[h]ad the agents . . . simply offered [Jacobson] the opportunity to order child pornography through the mails, and [he] . . . had promptly” accepted.⁴² If so, then Jacobson’s “position”—a Nebraskan farmer with limited access to child pornography—seems irrelevant.

The dissenters make a fair point. It seems difficult to read *Jacobson* as permitting the rule Posner adopted, much less as compelling it. On Posner’s behalf, however, one might reply that the “otherwise innocent” notion that Justice White expressed is not a casual rephrasing of the law but an idea deeply embedded in entrapment doctrine. Although Posner noted that the key *Jacobson* language he relied on “is not found in previous opinions,”⁴³ there is something similar in *Sorrells*, the Supreme Court’s first entrapment

³⁹ *Jacobson*, 503 US at 553–54 (emphasis added).

⁴⁰ *Hollingsworth*, 27 F3d at 1199.

⁴¹ See *id.* at 1211 (Coffey dissenting), quoting *Jacobson*, 503 US at 550 (“[A]lthough he had become predisposed to break the law by May 1987, . . . the Government did not prove that this predisposition was . . . not the product of the attention that the Government had directed at petitioner since January 1985.”).

⁴² *Hollingsworth*, 27 F3d at 1206 (Coffey dissenting), quoting *Jacobson*, 503 US at 550.

⁴³ *Hollingsworth*, 27 F3d at 1199.

case. The *Sorrells* Court held that Congress did not intend that its criminal statutes would permit the police to “instigat[e] . . . an act on the part of persons *otherwise innocent* in order to lure them to its commission and to punish them.”⁴⁴

It is difficult to read “innocent” here to refer to conventional innocence, given that the kind of defendants we are discussing have all committed the actus reus of an offense with the requisite mens rea. Usually, they also believe that they are committing crimes.⁴⁵ Thus, even before the Supreme Court decided *Jacobson*, Jonathan Carlson read this passage of *Sorrells*, as I do, to refer to the “core idea[] . . . that it is improper to impose criminal sanctions upon a person who would not have engaged in criminal conduct absent an effort by the government to induce such conduct.”⁴⁶ If so, then *Sorrells*’s “otherwise innocent” term arguably means, as in *Jacobson*, “an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law.”⁴⁷ So, even though the Court has never before used Justice White’s phrasing, the idea it expresses arguably predates the *Jacobson* opinion and is central to predisposition, not an unintentional implication of an imprecise restatement.⁴⁸ That does not mean that the Supreme Court precedent has ever required a positional element to predisposition, but that it has never addressed the question and its concept of entrapment plausibly entails the requirement.

Now let’s move from the doctrinal question to the policy one. Whatever the meaning of *Jacobson*, Posner was right (at least from a consequentialist standpoint) to think that entrapment doctrine should care whether someone is in a position to offend. To fully resolve the policy debate might require asking about the underlying purpose of the entrapment defense and choosing among the competing normative theories.⁴⁹

⁴⁴ *Sorrells*, 287 US at 448 (emphasis added).

⁴⁵ See Richard H. McAdams, *The Political Economy of Entrapment*, 96 J Crim L & Criminol[**cq**] 107, 121–22 (2005) (noting the difficulty in distinguishing, on grounds of blameworthiness, cases where a defendant was entrapped by a government agent and cases where a defendant succumbed to the same inducement provided by a private individual).

⁴⁶ Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va L Rev 1011, 1051 (1987).

⁴⁷ *Jacobson*, 503 US at 553–54.

⁴⁸ As Posner conceded, the weakness of this argument is that the courts of appeals were, before *Jacobson*, reaching a consensus that predisposition meant pure willingness. Rather than argue that these Courts had misinterpreted Supreme Court precedent, Posner argued instead that *Jacobson* changed everything. See *Hollingsworth*, 27 F3d at 1198 (“[Predisposition] is suggestive of pure willingness But the suggestion cannot in our view be squared with *Jacobson*.”).

⁴⁹ This is a complex question that many long articles address. See the literature cited in McAdams, 96 J Crim L & Criminol at 119–49 (cited in note 45) (critiquing existing entrapment theory).

Fortunately, I believe we can see the wisdom in Posner’s approach without fully agreeing on the ultimate rationale of the entrapment defense. Whatever it is, the defense distinguishes between two types of defendants: (1) those “otherwise innocent” or “otherwise law-abiding” individuals who would not likely offend but for government inducement, and (2) those otherwise non-law-abiding citizens who, outside undercover operations, likely *would* run afoul of the law (by committing the same type of offense). When the undercover operation ensnares a citizen from the second category, who likely offends outside undercover operations, the police have apprehended precisely the kind of individual whom we need to deter and incapacitate. As Posner put it, “[a] person who is likely to commit a particular type of crime without being induced to do so by government agents, although he would not have committed it when he did but for that inducement, is a menace to society and a proper target for law enforcement.”⁵⁰ By contrast, a person from the first category poses no threat to society because, if the police leave him alone, he will not offend. There is much more one could say about linking the categories to the ultimate rationale for the defense,⁵¹ but I will take for granted, as many discussions of entrapment do, that the defense is founded on this distinction.

Indeed, the dissenters do not really argue against this basic idea; none explicitly says that it is desirable to punish individuals who are unlikely ever to offend outside of undercover operations. Instead, their argument is that it is difficult to make the distinction except purely as a matter of willingness. They worry that positional predisposition will be too hard for the prosecutor to prove.⁵² I address this point below, but we should initially consider why the concern for whether a person will otherwise offend led Posner to care about whether the defendant is in a position to offend.

If we are to distinguish between those who are and are not likely otherwise to offend, then Posner is surely right that the doctrine should consider *any* reason that a person is not likely to offend. Economic theory has a lot to say about how to distinguish between the two classes of

⁵⁰ *Hollingsworth*, 27 F3d at 1203.

⁵¹ See generally McAdams, 96 J Crim L & Criminol 107 (cited in note 45), in which I tie the distinction to two rationales: (1) the need to temper a principal/agent problem that otherwise causes police to use undercover operations to generate a high number of low value arrests, and (2) the need to provide limits on the power of government officials to target political enemies and unpopular scapegoats. I advocate, however, that the distinction be implemented by defining predisposition in a way that will *usually* exonerate only the “otherwise innocent,” and not to attempt in each case to determine whether the defendant is otherwise innocent.

⁵² See *Hollingsworth*, 27 F3d at 1218 (Ripple dissenting) (“This holding adds a whole new dimension to the arsenal of the mainstream drug trafficker and the traditional racketeer.”)

individuals. A person's risk of offending is a combination of his preferences and opportunities. Some people have unusually good opportunities to offend but will not take them because of their preferences; other people have preferences unusually favorable towards crime but will not act on them because they lack the opportunity. If we want to use entrapment doctrine to exculpate these objectively harmless people, then we should define predisposition to exclude from punishment those who are sufficiently unlikely to offend because of *either* their preferences or opportunities. This means granting a defense to those who are generally unwilling to offend even given good opportunities *and also* to those who are unable to offend despite their willingness. Of course, most people are *able* to commit most crimes; willingness is the central issue because those who are willing to offend usually will. But on "rare"⁵³ occasions, position will also matter.

To be more precise, consider the analysis of predisposition offered by Ron Allen, Melissa Luttrell, and Anne Kreeger (Allen, et al).⁵⁴ Most undercover operations target offenses involving illegal market transactions, such as the purchase and sale of narcotics, automatic weapons, sexual services, and official favors. Allen, et al therefore suggest a "market test" for the entrapment defense—that the government be allowed to offer no greater an inducement than the price offered in the actual criminal market.⁵⁵ The intuition behind this seems strong—the people whom we need to deter and/or incapacitate are those who will offend given existing and probable levels of inducement. The Allen, et al approach suggests why simple willingness should not always be sufficient to nullify the entrapment defense. A person might be willing to offend when first tempted only because the offer is vastly better than any that would ever materialize in the real world. That someone would sell drugs at ten times the market level does not prove they would sell drugs at the market level.

Allen, et al make an important breakthrough, but did not go far enough in defining what the market test should mean in practice.⁵⁶ To identify individuals otherwise likely to offend, one cannot merely ask if the government limited its inducement to a market *price*, even if "price" includes all variables affecting the attractiveness of the offer. One should

⁵³ Id at 1200 (majority).

⁵⁴ Ronald J. Allen, Melissa Luttrell, and Anne Kreeger, *Clarifying Entrapment*, 89 J Crim L & Criminol[**qj**] 407, 413–14 (1999) (arguing that entrapment analysis should shift from predisposition to market value, as everyone, excepting saints, has a price at which they will commit crimes).

⁵⁵ Id at 414–20 (arguing that the market test will serve the three main functions of punishment: deterrence, incapacitation, and rehabilitation).

⁵⁶ See the similar discussion in McAdams, 96 J Crim L & Criminol at 178 (cited in note 45).

also ask whether, in the market, a particular person would be *able to obtain* the market price (as a buyer or seller). In many or most black markets, this additional question is unnecessary because anyone who is willing to participate is able to participate, at least at some level. In a thick market, as that for illegal drugs, it is relatively easy to locate sellers of at least modest quantities of the contraband, and anyone who can buy can in turn sell. The same is generally true of services, given that solicitation itself is usually a crime. Anyone willing to solicit sex for money can do so. Among those willing to offer a bribe, only the truly destitute are incapable.

By contrast, there are certain black markets in which the willingness to participate is not sufficient because there are substantial barriers to participation. One example is when access is limited. One cannot sell contraband that one cannot obtain—for example, a stolen military submarine. But most examples involve services because services often involve special knowledge or skill that many people cannot provide. For example, in the counterfeiting hypothetical Posner described, the undercover target has no knowledge of counterfeiting. At oral argument, the prosecution conceded that it would be a strong case for entrapment if undercover agents offer to set up such a novice with the machines and personnel necessary to counterfeit currency and offer to pay him handsomely for pressing the right button.⁵⁷ The concession is necessary because it is so obvious that no one would pay the market price for counterfeiting services to someone who lacks the relevant knowledge or skill. And no one would pay *that* market price for a service anyone could perform, such as pushing a button. Thus, the fact that one is willing to accept such an implausible offer does not prove that one would otherwise offend.

Within the broad category of black market crimes where participation depends on ability as well as willingness, there is a special subset where ability is particularly important. For these crimes, the buyer values quality not just for the normal reasons—to satisfy his preferences—but also to avoid detection. Consider arson for hire. Suppose a building owner seeks to hire an arsonist to burn his building in order to collect on the fire insurance. If the arsonist does a bad job, then the owner's problem is not that the building does not burn down, but that the scheme is detected and he goes to prison. Bad arson is far worse than no arson. For this reason, whatever the market price is for arson, it is not likely to be offered to those who have no relevant skill, knowledge, or experience in making an intentional fire

⁵⁷ *Hollingsworth*, 27 F3d at 1199.

appear to be accidental. If the government offers the market price for a skilled arsonist to someone with no such experience, then there is a great risk that the government will induce an individual to offend who would never otherwise do so.⁵⁸

Posner made the same point about Pickard and Hollingsworth. Again, the whole point of money laundering is to prevent the government from tracing money. Hiring someone who does a poor job of laundering money is worse than hiring no one at all; worse than not being able to spend one's cash is not being able to spend one's cash because one is in prison. So if the police offer the market price to one with no relevant experience, knowledge, or contacts, they create a serious risk of inducing a crime by one who would never otherwise offend.

Now we come to the dissenters' concern. They believed that the concern for position will be easily exploited by clever criminal defendants and make undercover operations far less effective.⁵⁹ This fear is misplaced. The dissent seems to ignore Posner's assurance that the positional element does not depend solely on whether the defendant has the "*present means*" to commit the crime, but whether he is likely at some point to acquire the means.⁶⁰ As explained above, for most crimes that undercover operations target, the defendant is in a position to commit the crime. One obvious piece of proof is that most courts of appeals have never had to decide whether to follow or reject *Jacobson* because so few willing defendants can plausibly assert that they lacked the position to commit the crime. This is no surprise. The most common undercover operation induces the sale of an illegal drug. Yet where the defendant delivers the right goods, he cannot

⁵⁸ Of course, the inexperienced arsonist is also more likely to be apprehended than the skilled arsonist, which gives him some reason to decline the offer. But even if the arson is detected, the probability that the police will apprehend the arsonist may be low—he commits the crime in private and has the option of immediately fleeing the jurisdiction. The poor or homeless especially may think the risk is worth it, even though they would never be offered the market price by an actual building owner.

⁵⁹ See *Hollingsworth* at 1217 (Ripple dissenting) (“[The positional requirement] will provide first-rate arrest insurance for the occasional drug trafficker who, willing to ply his trade whenever the opportunity presents itself, is still not quite sufficiently organized when the opportunity is provided by the undercover agent.”). [39 words] The Ninth Circuit raised a similar concern in rejecting *Hollingsworth*. See note 6.

⁶⁰ *Id.* at 1202–03 (majority). The central issue for Posner is whether the defendant, “if left to his own devices, *likely* would have never run afoul of the law.” *Jacobson*, 503 US at 553–54 (emphasis added). Thus, there is no defense for the “person who is likely to commit a particular type of crime without being induced to do so by government agents, although he would not have committed it when he did but for that inducement.” *Hollingsworth*, 27 F3d at 1203. Posner illustrates this by noting that it would not be entrapment for the government to supply a defendant with a boat necessary to commit the offense, because an actor presently lacking only a boat to complete his criminal scheme is likely eventually to offend without government aid. *Id.* at 1202–03. See also note 14.

tenably assert that he lacked the position to commit the trafficking offense. For illegal services, perhaps the most common crime targeted in undercover operations is the acceptance of a bribe. Yet in bribery stings the police target only those individuals, usually government officials, who possess the discretionary authority that gives them the position to be bribed.⁶¹

In the end, Posner's decision made a narrow change in the law of entrapment, yet one that seems to make the defense more rational. We quite plausibly want to prevent conviction of those who are unlikely otherwise to offend. If so, then we will *usually* determine that fact by examining the defendant's willingness to offend. But in some special cases, such as *Hollingsworth*, we will also have to examine their ability to offend.

Notwithstanding my defense of *Hollingsworth*, for teaching purposes, I like to test its basis and scope by asking about its application in other contexts. Consider Hemant Lakhani, who agreed to sell missiles and a launcher to an FBI agent he believed was a terrorist intending to shoot down American passenger planes.⁶² The problem for the FBI was that Lakhani had no access to these weapons, though they gave him almost a year to find them. Lakhani also resembles Pickard in that he had lived a long time (69 years) without incurring a criminal record and seemed to have many get-rich-quick schemes that did not pan out (for example, to the undercover FBI agent, he also proposed to sell diamonds, scrap metal, and mangoes, the last to sell to Mexican immigrants). Ultimately, the FBI had Russian undercover operatives sell Lakhani a (nonfunctional) launcher so he could make the promised sale, which he did (though when he received the launcher from the Russians, Lakhani appeared to test it by placing it on his shoulder pointing *backwards*). Should he be entitled to the entrapment defense as a matter of law because he was not in a position to commit this

⁶¹ The basis for concern that Judge Ripple expressed in his dissent, see note 59, is obscure. If the occasional drug trafficker's disorganization prevents him from selling drugs when asked by an undercover agent, then there will likely be no conviction regardless of what the entrapment rule is. There appears to be no undercover offense. But if the trafficker does sell drugs, then he demonstrates his ability to do so regardless of how disorganized he is. *Thickstun's* concern, see note 6, is also misplaced. That opinion worries that a bribe maker would lack the position to offend unless the government proves that a genuine bribe taker would cooperate. But Posner would clearly allow the conviction of Pickard if he merely had the knowledge, experience, or institutional contacts to become a money launderer, without the additional proof of particular criminals with whom he would transact. Thus, Posner assumes that one who is willing and able *to do his part* in a crime is sufficiently likely to find a criminal partner that his punishment is justified. To be in position to make a bribe, all one needs is money.

⁶² See Petra Bartosiewicz, *I.O.U. One Terrorist: Rounding Up "Al Qaeda," One Stooze at a Time*, Harper's 48, 48–49 (Aug 2005) (using the Lakhani story to criticize the Bush administration's terrorism prevention policies); Petra Bartosiewicz, *The Arms Trader*, This American Life (Chicago Public Radio Jul 8, 2005), audio online at <http://www.thislife.org/> (visited April 29, 2007) (discussing Lakhani's case in the context of the challenges of post-September 11 terrorism prevention).

crime?⁶³ The irony here is that Posner favors controversial government powers to fight terrorism,⁶⁴ yet his positional element might provide Lakhani with a defense. I have argued elsewhere that the ideal entrapment defense would be tailored to the particular class of crime, rather than the one-size-fits-all defense we now have.⁶⁵ Thus, if actors like Lakhani deserve no defense, this would not mean that one has to reject the positional element for all crimes. One could plausibly distinguish between violent and nonviolent crimes, finding that position is required to convict a defendant who willingly commits a nonviolent offense in an undercover operation, but not required for one who willingly commits a violent offense in such an operation, given the danger that violence poses. Under the existing approach, however, this tailoring is unavailable, leaving the same rules for Pickard and Lakhani.

In any event, Posner's view may offer a more satisfying explanation of the result in *Jacobson*. Justice White had to strain to explain why the evidence in *Jacobson* was, despite a jury verdict, legally insufficient to show that Jacobson was predisposed. Courts have generally required little evidence to prove predisposition. Admittedly, the evidence of Jacobson's willingness to purchase child pornography would have been stronger if Jacobson's past purchase had at the time been illegal. But most Nebraska farmers (like most citizens) probably do not know the legal significance of the Child Protection Act of 1984, so it is likely that Jacobson either (a) did not know his earlier purchase of child pornography was legal or (b) did not know his contemporary purchase of child pornography was illegal. If he thought his prior conduct was a crime, it is evidence of his willingness to offend. Also, if he thought his contemporary conduct was not a crime (which is no defense), then the prior purchase is evidence of his willingness to commit acts that are in fact a crime. The only way that the prior purchase has no probative value, as Justice White suggests, is if (c) Jacobson knew at the earlier time that the purchase was legal and knew at the later time of the sting operation that the purchase was illegal. There seems to be no reason to

⁶³ In fact, Lakhani was convicted and sentenced to forty-seven years in prison. See John Sullivan, *British Businessman Sentenced in Terror Case*, NY Times B6 (Sep 13, 2005).

⁶⁴ See generally Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford 2006). See also id at 147 (urging that constitutional rights should reflect a pragmatic balance between "competing constitutional values, such as personal liberty and public safety").

⁶⁵ See McAdams, 96 J Crim L & Criminol at 168-73 (cited in note 45) (suggesting that the defense should vary with, among other things, the severity of the crime charged, the effectiveness of ordinary reactive law enforcement for that crime, the elasticity of demand for the crime, the proportion of such crimes committed by recidivists, and, for black market crimes, the thickness of the criminal market).

deny to the jury the power to make inferences about Jacobson's knowledge of the law, which includes the right to reject (c) as implausible.

Then there is the fact that, as soon as the government agents offered to sell Jacobson child pornography, he placed an order.⁶⁶ Admittedly, the evidence would have been better for the prosecution if Jacobson had placed the order without having first received twenty-six months of correspondence advocating his right to do so. But note that Jacobson never once said no. One could understand throwing out the jury verdict if the evidence showed that for each of the first twenty-five of those twenty-six months Jacobson had refused to order child pornography the government had offered. Even a few refusals would be powerful evidence of unwillingness. But here we have no offers until the end of the twenty-six months, so there is no evidence of reluctance. Eventual willingness is some evidence of initial willingness. In the end, one can see why four justices thought the prior purchase plus the present absence of reluctance was sufficient evidence of predisposition.

By contrast, if predisposition includes a positional element, one can add to Justice White's analysis the fact that Jacobson was not in a position where he was likely to be tempted to offend, being a farmer in a rural state.⁶⁷ One could say that the evidence was sufficient to show his willingness, but given that federal agents found no child pornography in Jacobson's home other than what they sent him, he apparently lacked the position to offend. (Unlike other forms of contraband, a person who has such material is very likely to have it at their home, especially when they work from their home.) Admittedly, the positional issue remains a close one given that Jacobson had once purchased such material by mail when it was legal. But a legal purchase is arguably very weak evidence that one can find access when the good is illegal because sellers will be far fewer and less visible.

Given Posner's interpretation, *Jacobson* may obviously be broader than it first seems because it recognizes a positional element to predisposition. But it is also narrower because, under his interpretation, *Jacobson* does not necessarily make willingness harder to prove. To illustrate, assume the facts are the same as *Jacobson* except that the

⁶⁶ Actually, near the end of the investigation, Jacobson was *twice* offered the opportunity to buy child pornography and placed an order each time, though the first order was never sent. See *Jacobson*, 503 US at 546–47.

⁶⁷ *Jacobson* does not say whether Jacobson had internet access at home, which could obviously change the analysis (though it seems unlikely that a rural farmer in the 1980s would have had internet access).

defendant is clearly in the position to buy illegal child pornography—he is an urban dweller who lives across the street from an adult book store that is shown to have sold such material and to advertise via handbills the sort of claims the government used in *Jacobson*. Thus, even if the government’s search of this hypothetical defendant’s home discovers no pornography other than what the government provided, we know that he could easily find access to the material. Given Posner’s positional analysis, one could distinguish this hypothetical case from *Jacobson* by saying that, while there is sufficient evidence in both cases that the defendant is willing, only in the hypothetical is the defendant clearly also in the *position* to offend. Given that he is now likely otherwise to offend, the proper result is to sustain the conviction. Under the *Hollingsworth* dissenters’ view of *Jacobson*, however, these new facts change nothing. Their view is that *Jacobson* turns entirely on insufficient evidence of willingness. That the hypothetical defendant is well positioned to offend would not change the analysis, under which the government’s twenty-six-month letter-writing effort compels an acquittal.

* * *

The issue in *Hollingsworth* had probably never really been answered in either direction by the Supreme Court because it has probably never been recognized as a separate question. By seeing the issue, Chief Judge Posner created the opportunity to reform entrapment doctrine to further the ends it serves—to distinguish the otherwise law-abiding from the otherwise criminal. The best defense of the opinion involves some basic economic concepts, such as the distinction between preferences and opportunities and the observation that, in markets where quality matters sufficiently, those who lack the ability to supply high-quality goods or services will lack the opportunity to sell. It is probably no coincidence that Posner’s opinion did not explicitly discuss economic concepts, but strategically grounded the decision more in precedent than theory. The opinion illustrates not only Posner’s interpretive skills but his leadership, in that he manages to persuade just enough fellow judges to embrace an approach of great novelty. Whenever the Supreme Court does address the issue, the justices would do well to read his opinion carefully.

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