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Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases

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Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases

I.	INTRODUCTION	1869
II.	THE SETTING FOR AN ISSUE OF POSITIONAL PREDISPOSITION.....	1874
III.	THE LOGIC OF EXCULPATION FOR INABILITY	1877
	A. <i>The Purpose of the Entrapment Defense</i>	1878
	1. The Subjective (Majority) Approach	1880
	2. The Objective (Minority) Approach.....	1881
	B. <i>The Real Nature of Predisposition</i>	1884
	C. <i>The Act Requirement in Criminal Law</i>	1889
	D. <i>Allowing Ability to be Determinative of Predisposition</i>	1891
IV.	THE SCOPE OF EXCULPATION FOR INABILITY.....	1894
	A. <i>The Purpose of the Impossibility Defense</i>	1894
	B. <i>When Impossibility Is Not a Defense: Factual and Hybrid Legal Impossibility</i>	1896
	1. Factual Impossibility.....	1896
	2. Hybrid Legal Impossibility.....	1897
	C. <i>When Impossibility Is a Defense: Inherent Impossibility</i>	1898
	1. The Presumption Behind the Inherent Impossibility Defense	1901
	2. The State of Inherent Impossibility Law....	1902
	D. <i>Applying the Impossibility Defense to the Positional Predisposition Inquiry: Defining the Scope of Exculpation for Inability in Entrapment Cases</i>	1905
	E. <i>A Fresh View of Hollingsworth Under the Impossibility Approach</i>	1906
V.	CONCLUSION	1908

I. INTRODUCTION

The bumbling criminal has long been humorous to the law-abiding. Take, for example, a man recently intent on robbing a bank. The man entered a Bank of America bank, grabbed a deposit

slip, and wrote on it "This iz a stikkup. Put all your munny in this bag."¹ While waiting in line for a teller, he became worried that someone had seen him write the note and would inform the police.² Thus, he exited the bank, walked across the street to the Wells Fargo bank, and gave the note to a teller.³ The teller, probably sensing his lack of dangerousness from the note, informed him that she could not comply because the note was on a Bank of America deposit slip, not a Wells Fargo slip.⁴ He then returned to the other bank and began to wait in line.⁵ The Wells Fargo teller called the police and the man was arrested while waiting in line at the Bank of America.⁶

Many may wonder whether this man had enough wits to be a successful criminal. In general, however, this concern is irrelevant to the law. As long as he had an intent to commit the crime, and acted on that intent, he is culpable, and therefore punishable. There are rare cases, however, where unsuccessful defendants are exonerated. Consider for example a witch doctor who intends to commit murder with a voodoo doll; or an individual who tries to sink a battleship with a BB gun. In such cases, few would argue that prosecution for attempted murder or attempted battleship sinking is appropriate. Although these hypotheticals push the limits of possibility, they highlight the question of whether criminal inability may ever be grounds for exculpation.

This question was raised in *United States v. Hollingsworth*, a recent entrapment case where two defendants willingly acquiesced to a government agent's directions to launder money.⁷ The Seventh Circuit reversed the defendants' conviction because the court found them to be "foolish" men who had "no prayer of becoming money launderers without the government's aid."⁸ The court reasoned that, because the defendants had no "underworld contacts, financial acumen or . . . access to foreign banks," which were needed to commit the crime, they were "objectively harmless."⁹ Thus, the

1. *Wrong Bank* (viewed Sept. 15, 1999) <<http://members.aol.com./ChePazzo/CrooksAreStupid>>.

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See United States v. Hollingsworth*, 27 F.3d 1196, 1200-01 (7th Cir. 1994) (en banc).

8. *Id.* at 1202.

9. *Id.*

Seventh Circuit held that, in entrapment cases, one's inability to independently commit the crime in question is, in some cases, a legitimate defense.¹⁰ The Seventh Circuit's analysis has come to be known as the "positional predisposition" inquiry because it attempts to discern whether the defendant was in the position to commit the crime before being contacted by the government.¹¹ While some commentators have supported the *Hollingsworth* approach,¹² the Fifth Circuit recently became the third federal appeals court to reject the *Hollingsworth* approach.¹³ This Note

10. See *id.* at 1200 ("[To be convicted,] [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 . . ."). There is generous debate on the exact holding of *Hollingsworth*. See Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 FLA. ST. U. L. REV. 463, 490 (1998) (arguing that the proper inquiry regarding criminal ability is "whether the defendant subjectively perceived herself to have the ability to commit the crime at the time of the government's inducement"); Paul Marcus, *Presenting, Back from the [Almost] Dead, the Entrapment Defense*, 47 FLA. L. REV. 205, 232-33 (1995) (supporting the *Hollingsworth* holding because "criminal punishment is not to be for a guilty mind, but only for a guilty action or at least a probability of such an action"); Lori J. Rankin, Casenote, *Entrapment: A Defense for the Willing, Yet Unready, Criminal?*, 63 U. CIN. L. REV. 1487, 1515-16 (1995) (arguing that "[t]he *Hollingsworth* majority's misinterpretation of Supreme Court precedent . . . allow[s] a defendant to prevail on an entrapment defense despite the defendant's willingness to commit a crime"); Elliot Rothstein, Note, *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, 330 (1995) (arguing that the *Hollingsworth* rule is improper because it "will permit clever defendants to use the guise of stupidity or naiveté as a defense to their crime," which would "contravene both American criminal jurisprudence and our societal goal of punishing the blameworthy").

11. See *Hollingsworth*, 27 F.3d at 1200 ("Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has *positional* as well as *dispositional* force.") (emphasis added).

12. See Thomas G. Briody, *The Government Made Me Do It—The Changing Landscape on the Law of Entrapment*, 45 R.I.B.J., Mar. 1997, at 15, 17; Marcus, *supra* note 10, at 232-33; Catherine A. Schultz, Comment, *Victim or the Crime?: The Government's Burden in Proving Predisposition in Federal Entrapment Cases*, 48 DEPAUL L. REV. 949, 977-81 (1999). Some commentators have supported the *Hollingsworth* holding while still criticizing its reasoning. See Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 428-30 (1999) (arguing the *Hollingsworth* holding was correct, but "not for the reason given by Chief Judge Posner").

13. See *United States v. Brace*, 145 F.3d 247, 260 (5th Cir. 1998) ("In fact, the law of our circuit is at least arguably *contra* to the holding in *Hollingsworth*."); *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) ("[O]ur reading [of *Jacobson v. United States*] conflicts with that of the Seventh Circuit in *Hollingsworth*. . . . Having concluded that *Jacobson* does not require 'positional' predisposition, we decline to adopt such a requirement. A person's ability to commit a crime may illustrate her predisposition to do so, but should not become a separate element to be proven."); *United States v. Ulloa*, 882 F.2d 41, 44 (2d Cir. 1989) ("Although we have consistently approved the phrase 'ready and willing' as an appropriate definition of the requisite predisposition, we have never distinguished 'readiness' from 'willingness.'" (citation omitted)).

seeks to resolve the debate over the positional predisposition inquiry.

Entrapment cases typically involve undercover police tactics that are necessary to detect so-called "consensual crimes."¹⁴ These crimes, such as prostitution or drug use, are difficult to detect without covert tactics because neither party to the crime is likely to report it.¹⁵ Increased criminalization of consensual behavior, which was common in the early twentieth century, increases the prevalence and sophistication of police undercover tactics, creating a risk that previously innocent individuals will become trapped into a crime.¹⁶ In response to this risk, the judiciary created the defense of entrapment.¹⁷

As promulgated by the Supreme Court in 1932, the entrapment defense involves a simple two-part evaluation.¹⁸ First, the defendant asserting the defense must show that the government induced her to commit the crime.¹⁹ A successful showing of inducement shifts the burden to the prosecution to show that, despite the government inducement, the defendant was nonetheless predisposed to commit the crime.²⁰ Because a showing of inducement requires a relatively low threshold of evidence,²¹ the majority of

14. Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 164 (1976); see also *United States v. Russell*, 411 U.S. 423, 432 (1973) (stating that undercover police work is "one of the only practical means of detect[ing drug-related offenses]").

15. See Park, *supra* note 14, at 164.

16. As one commentator has noted:

The cause of [entrapment techniques] was basically the nature of the crimes America in the late nineteenth and early twentieth centuries witnessed the coming of Comstockery, the Mann Act, The Harrison Drug Act, Prohibition and sumptuary legislation generally to a degree unheard of at common law The significance of all these new crimes is their inadaptability to a prosecutory scheme based on private complaint Consequently the creation of these new offenses brought unaccustomed difficulties of enforcement in the attempt to discover the existence of criminal activity

Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 250-51 (1967).

17. See *id.*

18. See *Sorrells v. United States*, 287 U.S. 435, 451 (1932) ("[T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. . . . The predisposition and criminal design of the defendant are [also] relevant.").

19. See *Jacobson v. United States*, 503 U.S. 540, 548-549 (1992); see also *Mathews v. United States*, 485 U.S. 58, 62-63 (1988) ("[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.").

20. See *Jacobson*, 503 U.S. at 549.

21. See Lord, *supra* note 10, at 474 (stating that the showing of inducement "is usually a fairly easy burden for the defendant to meet"); see also PAUL MARCUS, *THE ENTRAPMENT DEFENSE* § 2.04, at 57 (2d ed. 1995) ("In many cases, of course, there is little difficulty in proving inducement").

debate in entrapment cases centers on whether the defendant was predisposed.²² Generally, predisposition has been understood solely as a mental state,²³ divined through an analysis of the "totality of the circumstances."²⁴ The Seventh Circuit's predisposition inquiry in *Hollingsworth* was novel because, besides taking account of the defendants' mental states, it took account of their mental and physical abilities as well.²⁵

The solution to the positional predisposition dispute requires answering two questions. First, on what grounds should criminal ability be considered at all by a court in determining a defendant's predisposition? Second, if ability is probative of predisposition, what degree of inability should be required for exculpation? This Note argues that a defendant's criminal ability is probative of that defendant's predisposition, and further, that a defendant's inability should be exculpatory to the degree that exculpation would be appropriate in cases of impossibility under criminal attempt law.

Part II of this Note provides the setting. It reviews the facts and judicial opinion of the most well-known positional predisposition case, *United States v. Hollingsworth*. Then, Part III demonstrates the logic behind exculpating defendants for their inability. In summary, Part III reasons that, because the entrapment defense's purpose is to determine the culpability of the defendant, the defendant's criminal ability should be considered since it is

22. See *United States v. Russell*, 411 U.S. 423, 433 (stating that the principle element in the defense of entrapment is the defendant's predisposition); *United States v. Resnick*, 745 F.2d 1179, 1186 (8th Cir. 1984) (stating that the principle element in the defense of entrapment is the defendant's predisposition); see also MARCUS, *supra* note 21, § 2.05, at 60 ("The major issue under the subjective test is predisposition.").

23. See *United States v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995) ("Predisposition is necessarily a fact-intensive inquiry because it is a subjective inquiry into a defendant's state of mind."); *United States v. Navarro*, 737 F.2d 625, 635 (7th Cir. 1984) ("[P]redisposition is, 'by definition 'the defendant's state of mind and inclinations before his initial exposure to government agents.'"); *United States v. Williams*, 705 F.2d 603, 618 (2d Cir. 1983) ("[P]redisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime.").

24. *State v. Jones*, 598 S.W.2d 209, 220 (Tenn. 1980) ("A finding of predisposition should be based on the totality of the circumstances."). See also MARCUS, *supra* note 21, § 4.12, at 135 ("Most trial courts look to all relevant facts in determining predisposition.").

25. Specifically, the Seventh Circuit reasoned:

The point is not that [the defendants] were *incapable* of engaging in the act of money laundering. Obviously they were capable of the act. All that was involved in the act was wiring money to a bank account designated by the government agent. Anyone can wire money. But to get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. [The defendants] had none.

United States v. Hollingsworth, 27 F.3d 1196, 1202 (7th Cir. 1994) (en banc).

probative of culpability. Part IV then addresses the concern that exculpation for all criminal inability may be too broad, since attempt law, in general, punishes unable defendants. Thus, Part IV argues that exculpation for criminal inability should be permitted only to the extent that such exculpation is permitted in cases of impossible criminal attempts. As will be demonstrated in Part IV, only a small category of impossible attempts, inherently impossible attempts, warrant a dismissal of criminal liability. Part V serves as a conclusion.

II. THE SETTING FOR AN ISSUE OF POSITIONAL PREDISPOSITION

In 1988, Hollingsworth and his friend, Pickard, had aspirations of wealth; they wanted to start a bank. Six years later, their fate was before the Seventh Circuit, sitting en banc. Nothing short of a fundamental change in entrapment law would provide for their release. Nonetheless, by a margin of just one vote, the Seventh Circuit created a new requirement for federal prosecutors in cases where government agents have induced the commission of a crime: prosecutors must show that the defendant was "so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced [the defendant] to commit the crime some criminal would have done so"²⁶

Hollingsworth was a farmer from Arkansas.²⁷ His friend, Pickard, was an orthodontist from the same state.²⁸ After attempting other legitimate schemes at making money, the two fell upon the idea of an international bank incorporated in the Virgin Islands.²⁹ With \$400,000 pooled between them, the two formed the bank, apparently unaware of the challenges and temptations that lay ahead.³⁰

Their lack of experience soon caught up with them. By May 1990, their "bank" had few, if any, customers, and was losing money at a rapid rate.³¹ Thus, in order to raise some capital, they offered their "Class A" international banking license for sale via the

26. *Id.* at 1200.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

classified ads in *USA Today*.³² On that very day, J. Thomas Rothrock, a U.S. Customs Agent, was attending a seminar on money laundering.³³ He noticed the advertisement and, newly aware that such licenses were sometimes used to launder money, decided to test the waters.³⁴ He called the phone number listed in the paper and left a message, identifying himself as "Tom Hinch."³⁵ When Pickard returned the phone call, Rothrock told him that he had a large quantity of cash that he needed to have deposited.³⁶ Pickard responded positively, advising Rothrock that he could take care of his cash by depositing it outside the United States, or by breaking up the large sums into smaller amounts.³⁷ Subsequent to this conversation, Pickard contacted Rothrock and explained to him that he could "clean and polish"³⁸ his money by putting it "into the banking system [so as to] . . . conceal the source of where the funds were coming from."³⁹ After these initial contacts, the communication between the two took a reprieve until February 1991.⁴⁰

In February, Rothrock contacted Pickard again and arranged to meet with him in St. Louis, Missouri.⁴¹ At the meeting, Rothrock told Pickard and Hollingsworth that the money in question was the result of a gun smuggling ring in South Africa.⁴² Rothrock added that "he had wished he never got his 'hands dirty,'" to which Pickard responded "I didn't even hear you say [that]."⁴³ In April 1991, the first transaction was consummated in Indianapolis, where Pickard had his broker wire \$20,000 into Rothrock's account in exchange for \$20,000 cash.⁴⁴ Over the next five months, Pickard and Hollingsworth performed four similar transactions, totaling \$415,000.⁴⁵ After the final transaction, the two Arkansas money launderers were arrested.

32. See *id.* at 1207 n.4.

33. See *id.* at 1200.

34. See *id.*

35. See *id.*

36. See *id.* at 1200-01.

37. See *id.* at 1201.

38. *Id.*

39. *Id.* at 1207 (original emphasis omitted).

40. See *id.* at 1201.

41. See *id.*

42. See *id.* at 1208.

43. *Id.* (alteration in original) (original emphasis omitted).

44. See *id.*

45. See *id.* at 1209.

After being convicted at trial, the two appealed, asserting that they were entrapped as a matter of law.⁴⁶ The Seventh Circuit reversed the conviction,⁴⁷ but then agreed to rehear the case en banc. After this second hearing, a strongly divided court again reversed Pickard and Hollingsworth's convictions, finding that they were not predisposed to commit their crime.⁴⁸

Speaking through Judge Posner, the majority reasoned that the defendants, though very willing to launder money, were not predisposed because "[p]redisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force."⁴⁹ Finding that Pickard and Hollingsworth were nothing but two "tyros" with whom no self-respecting criminal would deal, the court overturned their convictions.⁵⁰

Although predisposition to commit a crime has generally been understood as a mental state, the majority claimed that the Supreme Court's clarification of "predisposition" in *Jacobson v. United States*⁵¹ justified its unique analysis of criminal ability.⁵² The majority asserted that, because the defendant in *Jacobson* was exonerated despite being willing to commit the crime, willingness obviously is not wholly determinative of predisposition.⁵³ Rather, the appropriate test for determining predisposition, the majority argued, was enunciated in the final lines of the *Jacobson* opinion: "an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law [is not predisposed]."⁵⁴

Besides disagreeing that Pickard and Hollingsworth were too inept to independently commit the crime,⁵⁵ the minority also took issue with the majority's interpretation of *Jacobson*. *Jacobson* did not stand, asserted Judge Ripple in dissent, for the proposition "that the defendant [need have] sufficient aptitude and equipment

46. See *id.* at 1198.

47. See *United States v. Hollingsworth*, 9 F.3d 593 (7th Cir. 1993).

48. See *Hollingsworth*, 27 F.3d at 1203.

49. *Id.* at 1200.

50. *Id.* at 1202.

51. 503 U.S. 540, 550-53 (1992).

52. *Hollingsworth*, 27 F.3d at 1198-1200.

53. See *id.* at 1199.

54. *Id.* (quoting *Jacobson*, 503 U.S. at 553-54).

55. See *id.* at 1206 (Coffey, J., dissenting).

to commit the crime.”⁵⁶ Rather, *Jacobson* only held that the defendant need be predisposed prior to initial government contact.⁵⁷

Thus, the controversy between the majority and minority boils down to the meaning of “predisposition.” While each side in *Hollingsworth* attempted to defend its argument using the text of *Jacobson*, each attempt is limited to little more than conjecture because the *Jacobson* Court did not face an issue of positional predisposition. Rather, a clearer answer to the debate lies in analogizing the positional predisposition inquiry to settled doctrine in criminal law.

III. THE LOGIC OF EXCULPATION FOR INABILITY

In an entrapment case, the court’s chief purpose is to weigh the culpability of the defendant.⁵⁸ Culpability in criminal law is determined through an analysis of the defendant’s mens rea and actus reus.⁵⁹ The actus reus principle holds that individuals who have not acted are not culpable, no matter how nefarious their intentions were.⁶⁰ This section will discuss the purpose of the entrapment defense, the varied nature of the predisposition inquiry, and the actus reus component of criminal law. Following this discussion, this section concludes that criminal ability is probative of criminal predisposition because individuals who cannot act to commit a crime are per se not culpable.⁶¹

56. *Id.* at 1217 (Ripple, J., dissenting).

57. *Id.* at 1216; *see also id.* at 1206 (Coffey, J., dissenting):

The Supreme Court says nothing in *Jacobson* about the defendant not being in the position to commit the criminal act. *Jacobson* is significant not because it limits the potential targets of government sting operations to non-law-abiding citizens, but because it limits the measures which the government may take in attempting to induce an otherwise law-abiding citizen to violate the law. . . .

58. *See* MARCUS, *supra* note 21, § 2.01, at 53 (“[T]he attention of the [Supreme Court’s] subjective test is principally on the defendant: what he thought and how he reacted to the criminal opportunity.”) (footnote omitted).

59. *See* WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 24, at 175 (1972).

60. *See, e.g.,* United States v. Muzii, 676 F.2d 919, 920 (2d Cir. 1982) (“The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts.”); LAFAYE & SCOTT, *supra* note 59, § 25, at 177 (“Bad thoughts alone cannot constitute a crime . . .”).

61. This assertion uses “act” in the strictest sense, i.e. a defendant who cannot “act” cannot physically advance towards the completion of the crime. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1923) (arguing that to be an act, the movement “must be willed”); Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 647 (1917) (stating that an act is a “muscular movement that is willed”) (original emphasis omitted).

A. *The Purpose of the Entrapment Defense*

From the Supreme Court's first case on entrapment to the present day, a disagreement has existed over the purpose of the entrapment defense.⁶² Throughout the debate, a majority of justices has consistently concluded that the purpose of the entrapment defense is to ensure that the "unwary innocent" are not punished along with the truly culpable.⁶³ Seen in this way, the entrapment defense operates as a sorting mechanism: it sorts the culpable from the nonculpable, punishing the former and exonerating the latter.

Contrary to this, many jurists, legislators, and commentators have argued instead that the purpose of the defense is to protect citizens from "impermissible police conduct."⁶⁴ Advocates of this position argue that, similar to the logic behind the exclusionary rule, overbearing police conduct will be deterred if convictions are denied for otherwise criminal activity.⁶⁵

In order to fully understand the entrapment defense and its purpose, it is necessary to discuss the evolution of the defense. In the 1932 case *Sorrells v. United States*, the Supreme Court promulgated the entrapment defense.⁶⁶ There, a prohibition officer approached the defendant, Sorrells, with a request for liquor, but Sorrells declined to assist the officer, stating that he "did not fool

Part IV of this Note determines the liability of defendants who can *partially* act towards the completion of a crime.

62. See MARCUS, *supra* note 21, § 1.06, at 15 (noting the tensions among jurists over the purpose of the entrapment defense).

63. *Sherman v. United States*, 356 U.S. 369, 372 (1958). Since the inception of the defense, the Supreme Court has heard six cases on the entrapment defense, deciding in each that the entrapment defense should focus on the defendant's "predisposition" to commit the crime. See *Jacobson v. United States*, 503 U.S. 540 (1992); *Mathews v. United States*, 485 U.S. 58 (1988); *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman*, 356 U.S. 369; *Sorrells v. United States*, 287 U.S. 435 (1932).

64. *Sherman*, 356 U.S. at 385 (Frankfurter, J., concurring). For courts, legislatures, and commentators who favor an approach that focuses on police conduct, see *infra* notes 99-101.

65. See *Russell*, 411 U.S. at 430; *Commonwealth v. Tracey*, 624 N.E.2d 84, 88 (Mass. 1993) ("The main purpose of allowing [the entrapment] defense is deterrence of the undesirable manufacturing of crime by law enforcement officials.").

66. 287 U.S. 435 (1932). Prior to *Sorrells*, American courts often reasoned, like the English courts, that "a crime was a crime, regardless of the circumstances surrounding its commission." MARCUS, *supra* note 21, § 1.03, at 6. Using similar righteousness, an early New York court invoked the Bible as authority, noting that the entrapment defense first was used in "Paradise," where the defendant claimed "The serpent beguiled me and I did eat." The court went on to reason that this "defence was overruled by the great Lawgiver" and "under any code of civilized, not to say christian ethics, it never will [be accepted]." *Board of Comm'rs of Excise v. Backus*, 29 How. Pr. 33, 42 (1864). Gradually though, as undercover police tactics changed, the entrapment defense gained favor. See *supra* note 16.

with whiskey.’”⁶⁷ Later that same day the officer repeated his request, whereupon Sorrells again refused to offer assistance.⁶⁸ The officer remained with the defendant and turned the conversation to the First World War where, coincidentally, both had served in the same military unit.⁶⁹ After a period of reminiscing, the officer asked Sorrells a third time for some liquor,⁷⁰ at which point Sorrells left to “go and see if he could get a half gallon of liquor.’”⁷¹ When he returned with some liquor, he was arrested.⁷²

The challenge for the Court in *Sorrells* was to justify reversing the conviction of a defendant who had, by his own admission, committed the very act that federal law prohibited: the sale of liquor.⁷³ While eight of nine justices agreed that Sorrells should be exonerated, the Court divided on the proper justification. The majority favored exonerating Sorrells because he was not “predisposed” to commit the crime,⁷⁴ while the concurring justices favored exoneration based on the overbearing police tactics.⁷⁵ The majority’s approach later became known as the “subjective approach” because it focused on the subjective characteristics of the defendant. The minority approach became known as the “objective approach” because it utilized an objective review of police conduct. A more detailed analysis of each approach will now be undertaken.

67. *Sorrells*, 287 U.S. at 440.

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

69. *See id.*

70. Sorrells asserted through witnesses that the agent requested liquor “probably five times.” *Id.* at 440.

71. *Id.*

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

73. In considering this dilemma, the Supreme Court commented:

The argument, from the standpoint of principle, is that the court is called upon to try the accused for a particular offense which is defined by statute and that, if the evidence shows that this offense has knowingly been committed, it matters not that its commission was induced by officers of the Government in the manner and circumstances assumed. It is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only sense in which the law considers intent.

Id. at 445.

74. *See id.* at 441 (“[T]he act for which [the] defendant was prosecuted was instigated by the prohibition agent . . . [The] defendant had no previous disposition to commit it . . .”).

75. Justice Roberts, in his concurrence, opined that:

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.

Id. at 454-55.

1. The Subjective (Majority) Approach

The crux of the majority opinion in *Sorrells* was that, although federal law prohibited Sorrells' procurement of liquor, Sorrells was not guilty since the law did not apply to him.⁷⁶ The doctrinal basis for this conclusion was legislative intent.⁷⁷ Reading between the lines of the statute, the Court commented that it could not have been the "intention of the Congress," in enacting a statute prohibiting the sale of liquor, that "persons otherwise innocent" would be targeted for "instigation by government officials."⁷⁸

The majority's use of a subjective approach had an important procedural implication. Because the Court interpreted the underlying statute as excepting defendants "otherwise innocent,"⁷⁹ the Court was obligated to determine whether the defendant was, in fact, otherwise innocent. The Court made this determination by looking at the defendant's "predisposition," i.e., whether the defendant was predisposed to commit the crime absent the government's inducement.⁸⁰ While the Court's reliance on predisposition in *Sorrells* was somewhat obscure, later cases more clearly demonstrated the predisposition concept.

For instance, in *Sherman v. United States*, decided twenty-six years after *Sorrells*, the Court, in affirming its choice of the subjective approach, overtly signaled the importance of the predisposition inquiry.⁸¹ In *Sherman*, a government informant and the defendant separately sought treatment for narcotics addictions.⁸² After a period of time over which the two became acquainted, the informant told the defendant that he (the informant) was not responding to treatment and needed some narcotics.⁸³ At first, the defendant tried to avoid the issue, but after repeated requests "predicated on [the informant's] presumed suffering," the defendant obtained a quantity of narcotics that they both used.⁸⁴

76. See *id.* at 452 ("The federal courts in sustaining the defense in such circumstances have proceeded in the view that *the defendant is not guilty.*") (emphasis added).

77. See generally MARCUS, *supra* note 21, § 1.06, at 16-19; see also *Sorrells*, 287 U.S. at 450 ("To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts.").

78. *Id.* at 448.

79. *Id.*

80. See *id.* at 451.

81. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

82. See *id.* at 371.

83. See *id.*

84. *Id.*

The Court reversed Sherman's conviction because it expressly found him not predisposed to commit the crime at the time that the informant contacted him.⁸⁵ Although the defendant had a nine-year-old drug sales conviction and a five-year-old drug possession conviction, the Court found these insufficient to "prove [the defendant] had a readiness to sell narcotics at the time [the informant] approached him . . ."⁸⁶ Although many may disagree factually as to whether such prior convictions prove a predisposition, there is no room for debate regarding the Court's application of the test. The Court, professing its goal to separate the "unwary innocent" from the "unwary criminal"⁸⁷ expressly reviewed the defendant's predisposition.⁸⁸ Thus, after *Sorrells* and *Sherman*, the heart of the subjective test became the predisposition inquiry.⁸⁹

2. The Objective (Minority) Approach

Despite the *Sorrells* Court's almost unanimous support for the formation of the entrapment defense, bitter disagreement existed over its proper application. Contrary to the majority analysis, a minority of justices in *Sorrells* determined that, although Sorrells had clearly violated federal law,⁹⁰ his conviction should be reversed based on a "fundamental rule of public policy" that cautions against overzealous law enforcement.⁹¹ The minority criticized the majority's legislative intent argument as a "strained and unwarranted construction of the statute . . ."⁹² Justice Robert's concurrence, despite its vigorous admonition for a focus on government conduct, failed to offer any test for such an inquiry. Accordingly, in the next Supreme Court entrapment case, *Sherman v. United States*, Justice Frankfurter articulated a test to put the objective theory into practice.⁹³

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

86. *Id.* at 375.

87. *Id.* at 372.

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

89. The Supreme Court explicitly recognized this fact in *United States v. Russell*, 411 U.S. 423, 433 (1973) ("[T]he principle element in the defense of entrapment was the defendant's predisposition to commit the crime."); see also *United States v. Fadel*, 844 F.2d 1425, 1433 (10th Cir. 1988) (stating that predisposition is the "crucial factor").

90. See *Sorrells v. United States*, 287 U.S. 435, 456 (1932) (Roberts, J., concurring) ("[H]is act, coupled with his intent to do the act, brings him within the definition of the law . . .").

91. *Id.* at 457.

92. *Id.* at 456.

93. 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

Although still only supported by a minority, *Sherman* represented an era in the Court when the objective approach received its highest level of support.⁹⁴ In a forcefully argued concurrence, Justice Frankfurter argued that, "[n]o matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct . . . is not to be tolerated by an advanced society."⁹⁵ Thus, Justice Frankfurter offered the following standard for determining entrapment: defendants shall be found entrapped when "police conduct revealed in the particular case [falls below] standards, to which common feelings respond, for the proper use of governmental power."⁹⁶

Just as the subjective test had the procedural implication of requiring an inquiry into the defendant's personal disposition, the objective test had the implication of requiring scrutiny of police conduct. This focus seemed rational considering the common view that the entrapment defense represented a response to new police enforcement tactics.⁹⁷ Nonetheless, subsequent to *Sherman*, Supreme Court support for the objective approach dwindled to the point where, in the most recent entrapment case, the Court's opinion did not even mention the objective approach.⁹⁸ The objective approach, however, is alive and well outside the Supreme Court. Besides the numerous commentators who support the objective approach,⁹⁹ it has also been adopted by many state courts¹⁰⁰

94. See W.H. Johnson, III, Note, *Proving a Criminal Predisposition: Separating the Unwary Innocent from the Unwary Criminal*, 43 DUKE L.J. 384, 392 (1993).

95. *Sherman*, 356 U.S. at 382-83 (Frankfurter, J., concurring).

96. *Id.* at 382.

97. See *supra* note 16.

98. See *Jacobson v. United States*, 503 U.S. 540 (1992); see also Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829, 867 (1992) ("[N]o current Justice on the Supreme Court seems remotely interested in adopting the objective approach to entrapment . . .").

99. See LAFAYETTE & SCOTT, *supra* note 59, § 48, at 372 ("It is something of a strain to read an implied exception into the statute (excepting persons induced by law enforcement officials and their agents, but not those induced by other persons). It seems that public policy is the proper explanation of the entrapment defense."); LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME; STOPPING AND QUESTIONING SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 265-72 (1967); 1 NATIONAL COMM'N. ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 320 (1970) (also known as the "Brown Commission"). See generally Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 687-90 (1975); J.D. McClean, *Informers and Agents Provocateurs*, 1969 CRIM. L. REV. 527, 529-31; Edward Sagarin & Donald E.J. MacNamara, *The Problem of Entrapment*, 16 CRIME & DELINQ. 363 (1970); Ronald G.

and legislatures.¹⁰¹ Most notably, the American Law Institute adopted the objective approach in its Model Penal Code,¹⁰² opining that “the justification for the defense of entrapment” is “to deter wrongful conduct on the part of the government.”¹⁰³

None of this support for the objective approach, however, has persuaded the Supreme Court. In the four entrapment cases decided since *Sorrells* and *Sherman*, the Court explicitly reaffirmed the subjective approach.¹⁰⁴ Thus, in all federal courts and most

Schechter, *Police Procedure and the Accusatorial Principle*, 3 CRIM. L. BULL. 521 (1967); Paul W. Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959).

100. See, e.g., *Commonwealth v. Tracey*, 624 N.E.2d 84, 88 (Mass. 1993) (“[T]he main purpose of allowing this defense is deterrence of the undesirable manufacturing of crime by law enforcement officials.”); *People v. Barraza*, 591 P.2d 947, 954 (Cal. 1979) (in bank) (“[We are not concerned with] who first conceived or who willingly, or reluctantly, acquiesced in a criminal project. What we do care about is how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes.”); *State v. Leonard*, 243 N.W.2d 75, 80 (Iowa 1976) (“Under [the objective test that this court adopts,] the propensities and predisposition of the particular defendant are irrelevant. . . . [T]he police conduct must be sufficiently provocative to induce the normally law-abiding person to commit a crime.”).

101. “The states that currently [have a codified entrapment defense] are Alaska, Arkansas, Colorado, Hawaii, Iowa, Kansas, Michigan, New York, North Dakota, Pennsylvania, Texas, Utah and Vermont. It should be noted that North Dakota used an exclusively objective approach, but has now adopted a hybrid approach.” Scott C. Paton, Note, “*The Government Made Me Do It: A Proposed Approach to Entrapment Under Jacobson v. United States*,” 79 CORNELL L. REV. 995, 1002 n.45 (1994). For a description of the hybrid approach, see MARCUS, *supra* note 21, § 1.15 and Lord, *supra* note 10, at 498-503.

102. Section 2.13 of the Model Penal Code provides:

A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

- (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
- (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury. The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

MODEL PENAL CODE § 2.13 (1962).

103. See *id.* § 2.13 cmt. 1.

104. See *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992). The Court stated: Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

state jurisdictions, it is beyond question that the proper approach is the subjective one—one that sorts the culpable defendant from the nonculpable. The tool for accomplishing this separation is the predisposition inquiry: the predisposed are judged culpable and the non-predisposed are judged innocent.¹⁰⁵ It is unclear, however, what criteria should be used to determine predisposition.¹⁰⁶ This Note now turns to an analysis of the criteria courts have used to determine predisposition.

B. The Real Nature of Predisposition

While the Supreme Court has stated that “the principle element” of an entrapment case is the “defendant’s predisposition,” it has been less forthcoming in explaining what “predisposition” means.¹⁰⁷ This lack of guidance has left lower courts on their own to answer the difficult definitional question: what is predisposition? The conventional, but unanalyzed, answer to this question is that predisposition refers to a defendant’s mental state.¹⁰⁸ This common conception of predisposition, however, is inconsistent with the

Id.; see also *Mathews v. United States*, 485 U.S. 58, 63 (1988) (“[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.”); *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (“[T]he entrapment defense ‘focus[es] on the intent or predisposition of the defendant to commit the crime’ rather than upon the conduct of the Government agents.”) (citation omitted); *United States v. Russell*, 411 U.S. 423, 435 (1973):

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

105. See *Mathews*, 485 U.S. at 63 (“Predisposition, ‘the principal element in the defense of entrapment,’ focuses upon whether the defendant was an ‘unwary innocent’ or, instead, an ‘unwary criminal’ who readily availed himself of the opportunity to perpetrate the crime.”) (citation omitted) (quoting *Russell*, 411 U.S. at 433; *Sherman*, 356 U.S. at 372).

106. See generally MARCUS, *supra* note 21, § 4.12.

107. *Russell*, 411 U.S. at 433.

108. See, e.g., *United States v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995) (“Predisposition is necessarily a fact-intensive inquiry because it is a subjective inquiry into a defendant’s state of mind.”); *United States v. Ulloa*, 882 F.2d 41, 44 (2d Cir. 1989) (“The focus of the entrapment inquiry . . . is on the defendant’s state of mind.”); *United States v. Navarro*, 737 F.2d 625, 635 (7th Cir. 1984) (“[P]redisposition is, by definition, the defendant’s state of mind and inclinations before his initial exposure to government agents.”); *United States v. Williams*, 705 F.2d 603, 618 (2d Cir. 1983) (“[P]redisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime.”); *United States v. Garcia*, 562 F.2d 411, 418 (7th Cir. 1977) (“[T]he heart of the entrapment issue is predisposition, which is, itself, a ‘subjective mental state’”) (quoting *United States v. Townsend*, 555 F.2d 152, 155 n.3 (7th Cir. 1977)); *United States v. Mulherin*, 529 F. Supp. 916, 939 (S.D. Ga. 1981) (“[E]ntrapment . . . centers on the mental predisposition of the defendant. . .”).

methods used by courts to determine predisposition. This section seeks to resolve this inconsistency by analyzing many circuit court opinions as well as several Supreme Court opinions. These opinions demonstrate that the "mental state" conception of predisposition is incorrect. Rather, these opinions suggest that any characteristic of the defendant that sheds light on her culpability should be considered as a factor in determining predisposition.

While many courts pay lip service to the notion that the predisposition inquiry focuses on the "state of mind of the defendant," their true understanding of the inquiry is revealed by the factors they use to determine predisposition.¹⁰⁹ Some courts merely ask if the defendant was "ready and willing" to commit the crime,¹¹⁰ while others look at a defendant's reputation for illegal conduct,¹¹¹ desire for profit,¹¹² or ability to commit the criminal activity in question.¹¹³ Some courts utilize an organized list of factors to determine predisposition,¹¹⁴ while others shun such a formalized approach.¹¹⁵

109. *Townsend*, 555 F.2d at 161.

110. *See Ulloa*, 882 F.2d at 44 ("[W]e have consistently approved the phrase 'ready and willing' as an appropriate definition of . . . predisposition."); *United States v. Myers*, 692 F.2d 823, 849 (2d Cir. 1982) (collecting cases). Black's Law Dictionary defines "predisposition" as a "defendant's inclination to engage in illegal activity for which he has been charged, i.e., that he is *ready and willing* to commit the crime." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990) (emphasis added). Often, the "ready and willing" characteristic is evaluated by analyzing the defendant's response to the government's offer. *See, e.g.*, *United States v. Garza-Juarez*, 992 F.2d 896, 908 (9th Cir. 1993); *United States v. Tejada*, 974 F.2d 210, 218 (1st Cir. 1992); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1004 (10th Cir. 1992); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985); *United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir. 1985); *United States v. Hunt*, 749 F.2d 1078, 1086 (4th Cir. 1984); *see also* MARCUS, *supra* note 21, § 4.15, at 141 ("[T]he most telling evidence of a defendant's state of mind in the entrapment area is the manner in which she responds to the government inducement.").

111. *See, e.g.*, *United States v. Lard*, 734 F.2d 1290, 1293 (8th Cir. 1984) (seeking to determine "where [the defendant] sits on the continuum between naïve first offender and the street-wise habitue."); *Hunt*, 749 F.2d at 1085.

112. *See United States v. Dion*, 762 F.2d 674, 688-89 (8th Cir. 1985); *United States v. Groessell*, 440 F.2d 602, 606 (5th Cir. 1971).

113. *See United States v. Gunter*, 741 F.2d 151, 154 (7th Cir. 1984) ("Defendants were able to acquire large quantities of cocaine on short notice. . . . Defendants' ability to obtain the drug provided sufficient basis for the jury to infer that defendants were well versed in the drug trade [and thus predisposed.]"); *see also United States v. Hernandez*, 31 F.3d 354, 360 (6th Cir. 1994); *Perez-Leon*, 757 F.2d at 872 n.5. The use of ability to determine predisposition in this regard is distinct from that in *Hollingsworth*. While *Hollingsworth* held that a lack of ability demonstrated a lack of predisposition, cases such as *Gunter* and *Perez-Leon* held that a demonstration of ability suggested a predisposition. Thus, the pre-*Hollingsworth* rule regarding ability in federal courts was that an affirmative ability to commit the crime suggested a predisposition to commit the crime, but a lack of ability did not indicate a lack of predisposition.

114. For instance, the Eighth Circuit utilizes the following factors to determine predisposition:

(1) whether the defendant readily responded to the inducement offered; (2) the circumstances surrounding the illegal conduct; (3) the state of mind of a defendant before gov-

These variable approaches reveal two truths regarding the predisposition inquiry. First, there is no settled approach for determining a defendant's predisposition. Second, viewing in detail each of the factors considered by lower federal courts, it is doubtful that the purpose of the predisposition inquiry is solely to determine a defendant's state of mind.¹¹⁶ Certainly, some factors, such as the defendant's response to the government's offer, are probative of the defendant's state of mind.¹¹⁷ But other factors considered by courts lack any insight into the defendant's state of mind. For example, consider a defendant's past acts, criminal or otherwise.¹¹⁸ It is unclear how these reflect the defendant's state of mind at the time of the present crime because the defendant's criminal history does not necessarily indicate a predisposition to commit the present crime.¹¹⁹ Courts have also considered the defendant's reputation,¹²⁰ but this characteristic also fails to indicate a defendant's state of mind at the time of the crime.

ernment agents make any suggestion that he shall commit a crime;(4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged; (5) whether the defendant had already formed the "design" to commit the crime for which he is charged; (6) the defendant's reputation; (7) the conduct of the defendant during the negotiations with the undercover agent; (8) whether the defendant has refused to commit similar acts on other occasions; (9) the nature of the crime charged; (10) the degree of coercion present in the instigation law officers have contributed to the transaction relative to the defendant's criminal background.

Dion, 762 F.2d at 687-88 (citations omitted); see also *United States v. Busby*, 780 F.2d 804, 807 (9th Cir. 1986); *Perez-Leon*, 757 F.2d at 871; *United States v. Knight*, 604 F. Supp. 984, 987 (S.D. Ohio 1985).

115. For instance, the Eleventh Circuit opined in *United States v. Brown*:

Predisposition is necessarily a fact-intensive inquiry because it is a subjective inquiry into a defendant's state of mind. Therefore, entrapment as a matter of law cannot be reduced to any enumerated list of factors for a reviewing court to examine. Any list would necessarily be over and under inclusive by omitting factors which might prove crucial to a predisposition inquiry in one prosecution but are totally irrelevant in another.

United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995); see also *Hunt*, 749 F.2d at 1085 & n.9 ("Predisposition is necessarily a nebulous concept It is simply naïve to suppose that [defendants] can be neatly divided between the pure of heart and those with a 'criminal' outlook.").

116. This is forcefully supported by the list of factors used in *Dion*. See *supra* note 114. The *Dion* list includes the defendant's state of mind among several other factors. However, many other courts still refer to predisposition solely as a defendant's state of mind. See *supra* note 108.

117. See *MARCUS*, *supra* note 21, § 4.15, at 141 ("[T]he most telling evidence of the defendant's state of mind . . . is the manner in which she responds to the government inducement.").

118. See generally *id.* § 4.17.

119. See Maura F.J. Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1205-06 (1985).

120. See generally *MARCUS*, *supra* note 21, § 4.18.

Perhaps the most interesting instance of a court's departure from a strict "state of mind" inquiry occurred in *United States v. Dion*.¹²¹ *Dion* involved an adolescent Native American boy who was induced by the government to illegally procure American eagles.¹²² Knowing that the boy was extremely poor, the government offered him large sums of money for the performance of the crime.¹²³ In finding the boy entrapped, the court opined that "the unusual poverty of the defendant . . . must be considered in determining predisposition."¹²⁴ This reasoning is particularly interesting because one would suppose that an extremely poor person is, if predisposed at all, predisposed to commit a crime for money. Nonetheless, the court, explicitly taking account of the boy's want of money, found him *not* predisposed.¹²⁵ The court's reasoning seemed to be based on the rational observation that the government ought not be allowed to create crime on the backs of the desperately poor.¹²⁶ This case forcefully suggests that the predisposition inquiry is not merely an inquiry into the defendant's state of mind at the time of the crime, but rather a method for determining whether the defendant, considering the totality of the circumstances, is blameworthy. It is illogical to think that past acts, reputation, or financial status indicate a defendant's state of mind at the time of the alleged crime. It is much more logical, however, to think that such characteristics may affect a general estimation of the defendant's blameworthiness.

Supreme Court precedent echoes what *Dion* demonstrates: "predisposition" refers to more than the defendant's state of mind. While the Court used the word "predisposition" generously throughout its entrapment opinions, it also summarized the entrapment concept many times without using the word "predisposition." These summarizations give insight into the Court's

121. *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985).

122. *See id.* at 678-79.

123. *See id.*

124. *Id.* at 689.

125. *See id.* at 689-90.

126. The Eighth Circuit commented:

In this case, the government agents came upon an extremely impoverished Indian Reservation in a desolate area of South Dakota where, according to some of the witnesses at the trial below, life is for many Indians, a mere question of simple survival. The risk for the government in offering so much money to these individuals over a nearly two-and-one-half year period was that many who would never have shot a protected bird would be enticed into doing so.

Id.

understanding of the real nature of the predisposition inquiry. For example, in *Jacobson*, the Court concluded its opinion by stating: "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."¹²⁷ To best understand the meaning of this quote, note that elsewhere in *Jacobson* and throughout Supreme Court entrapment doctrine, the Court explicitly recognizes that entrapment cases hinge on the predisposition of the defendant.¹²⁸ Reading the *Jacobson* quote in this context, it is clear that a defendant is not predisposed "if left to his own devices, [he] likely would have never run afoul of the law" This understanding is considerably broader than whether the defendant was of a state of mind to commit the crime.

Other cases reinforce this assertion. For instance, in *Sorrells*, the Court declared that

'it is [improper] to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to, commit it.'¹²⁹

As well, in *Sherman*, the Court stated "Thus the Government [in inducing the crime] plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."¹³⁰

Although these quotes omit the word "predisposition," they are nonetheless instructive regarding the fundamental legal meaning of "predisposition." "Predisposition" in these cases is obviously understood to mean more than "tending" or "inclined," as it is defined in the dictionary,¹³¹ or "state of mind," as it is defined

127. *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992).

128. "Where the Government has induced an individual to break the law . . . the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act . . ." *Id.* at 548-49; *see also Mathews v. United States*, 485 U.S. 58, 62-63 (1988); *Hampton v. United States*, 425 U.S. 484, 488 (1976); *United States v. Russell*, 411 U.S. 423, 433 (1973) ("[T]he principal element in the defense of entrapment was the defendant's predisposition to commit the crime.").

129. *Sorrells v. United States*, 287 U.S. 435, 444-45 (1932) (quoting *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921)).

130. *Sherman v. United States*, 356 U.S. 369, 376 (1958).

131. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1786 (1993).

by the circuit courts.¹³² This observation makes sense when the purpose of the entrapment defense is taken into account. With a purpose of sorting the "unwary innocent" from the "unwary criminal,"¹³³ it only makes sense that predisposition, the "principal element in the defense," should serve as some measure of blameworthiness.¹³⁴ Thus, while courts define "predisposition" in various ways, the meaning of "predisposition" should be construed in such a way that it furthers the goals of the entrapment defense. Accordingly, a list of factors indicating predisposition should not be confined solely to criminal tendencies, but rather should encompass all factors that separate the innocent from the culpable.

C. *The Act Requirement in Criminal Law*

Our criminal law system is a rule-based system.¹³⁵ Such a system not only informs individuals of the specific behavior that will result in punishment,¹³⁶ but also ensures that criminal liability will be confined to those who truly deserve punishment.¹³⁷ For the most part, each rule in our system contains two elements: a mens rea and an actus reus.¹³⁸ The mens rea requirement generally is defended on retributive grounds, with the theory being that it is morally unjust to punish those who did not consciously choose to cause harm.¹³⁹ The actus reus requirement, which is the subject of this section, is understood to have many purposes.

First, and most basically, the act requirement in a rule-based system ensures that a defendant actually has done "something that deserves punishment."¹⁴⁰ Punishment based on retributive and preventive grounds is thus efficiently and fairly administered because it is meted out only to those who have demonstrated an ability to commit the proscribed wrong.¹⁴¹ The act requirement

132. See *supra* note 108.

133. *Sherman*, 356 U.S. at 372.

134. *Russell*, 411 U.S. at 433.

135. See Jonathon C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1053-54 (1987).

136. See *id.* at 1053-56.

137. See *id.*

138. See LAFAVE & SCOTT, *supra* note 59, § 27, at 191-92.

139. See HOLMES, *supra* note 61, at 3 ("[E]ven a dog distinguishes between being stumbled over and being kicked.").

140. See Carlson, *supra* note 135, at 1054; see also 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 312, at 353 (1958) ("[T]he State . . . suffers not from the imaginations of men . . .").

141. See Carlson, *supra* note 135, at 1054-55.

also has pragmatic value in that it assists in the determination of a defendant's mens rea.¹⁴² Without an act as evidence, it is more difficult to know what a person was thinking when that individual committed the crime.¹⁴³

But probably most central to the act requirement's justification is the notion that the criminal law should not be so broadly defined as to encompass those who prevent their ideas from becoming actions.¹⁴⁴ In this sense, the requirement preserves an individual's freedom of thought by ensuring that "no crime can be committed by bad thoughts alone."¹⁴⁵ As one commentator put it: "If [the law] were not so restricted [as to require only a mens rea] it would be utterly intolerable; all mankind would be criminals, and most of their lives would be passed in trying and punishing each other"¹⁴⁶

The act requirement also protects individuals from the state in other ways. First, the requirement ensures that an individual will not be subjected to the processes of the state unless that person chooses to by acting.¹⁴⁷ Second, the act requirement restrains a

142. See LAFAVE & SCOTT, *supra* note 59, § 25, at 179; JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 171-80 (2d ed. 1960).

143. William Blackstone recognized this aspect of the actus reus:

Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For, though, *in foro conscientiae* (at the tribunal of conscience), a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment.

4 WILLIAM BLACKSTONE, *COMMENTARIES* *20-21; see also Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 *YALE L.J.* 405, 405 (1959) (stating that the requirement of an act is "[r]ooted in skepticism about the ability . . . to know what passes through the minds of men").

144. See LAFAVE & SCOTT, *supra* note 59, § 25, at 179; see also *Powell v. Texas*, 392 U.S. 514, 543-44 (1968) ("Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society . . .").

145. See LAFAVE & SCOTT, *supra* note 59, § 25, at 178; see also *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982) ("The reach of criminal law has long been limited by the principle that no one is punishable for his thoughts."); *Powell*, 392 U.S. at 543-44 ("When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal.") (quoting GLANVILLE WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* 2 (2d ed. 1961))

146. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 78 (London, MacMillan 1883).

147. As one commentator put it:

[The act requirement protects the] capacity of the individual . . . to live his life in reasonable freedom from socially imposed external constraints [by providing a] *locus poeniten-*

government from malicious or discriminatory punishment. To this end, the act requirement provides "some devices to insure that the initiating decisions are, to the greatest extent possible, fair, evenhanded, and rational . . . [in that] the police and prosecutors confine their attention to the catalogue of what has already been defined as criminal."¹⁴⁸

Predictably, there is wide support for the act requirement in the common law. The Supreme Court has declared definitively that punishment for thoughts alone is a "situation universally sought to be avoided in our criminal law"¹⁴⁹ Courts at other levels have also concurred with the Supreme Court,¹⁵⁰ at times striking down laws that punish intent only.¹⁵¹ Not surprisingly, the American Law Institute has followed suit in its Model Penal Code by precluding conviction in cases that do not "include[] a voluntary act or the omission to perform an act of which [the defendant] was physically capable."¹⁵²

Given the well-settled criminal law requirement of an act, as well as the long-established purpose of the entrapment defense, and the real nature of the predisposition inquiry, an argument in favor of the positional predisposition inquiry will now be made.

D. Allowing Ability to be Determinative of Predisposition

To review the logic of this Note thus far, Part III.A established that the purpose of the entrapment defense is to sort the culpable from the nonculpable. Then Part III.B established that the predisposition inquiry is merely a generalized estimation of a

tiae, a point of no return beyond which external constraints may be imposed but before which the individual is free . . . of the very specific social compulsions of the law.

HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 75 (1968).

148. *Id.* at 89-90; see also Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 688 (1969) ("The requirement that the defendant's acts be themselves unlawful, rather than commonplace and permitted, establishes a formidable barrier between the organs of state and private citizens.").

149. *Powell*, 392 U.S. at 543.

150. See, e.g., *United States v. Price*, 134 F.3d 340, 350-51 (6th Cir. 1998) ("[B]ecause of . . . the danger of convicting for mere 'thoughts'[,]. . . we require that the 'substantial step' consist of 'objective acts'" (quoting *United States v. Pennyman*, 889 F.2d 104, 106 (6th Cir. 1989)); *Muzii*, 676 F.2d at 920 ("The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts.").

151. See *Ex parte Smith*, 36 S.W. 628, 629 (Mo. 1896), *State v. Labato*, 80 A.2d 617, 622 (N.J. 1951), *Lambert v. State*, 374 P.2d 783, 785 (Okla. Crim. App. 1962), and *Proctor v. State*, 176 P. 771, 772-73 (Okla. Crim. App. 1918), all holding that a law that results in punishment for thought alone is improper.

152. MODEL PENAL CODE, *supra* note 102, § 2.01(1).

defendant's culpability, not a structured analysis of the defendant's state of mind. Finally, Part III.C explained the act requirement and its essential role in the determination of culpability. These assertions lead to the conclusion set out below.

In entrapment cases, courts should allow ability to be determinative¹⁵³ of predisposition because criminal ability is highly probative of whether a defendant is culpable. A person who has no ability to commit a crime can do no more than think about the crime.¹⁵⁴ An unable, though willing, defendant is not culpable because culpability requires a mens rea and an actus reus, and such a defendant cannot independently satisfy the actus reus requirement. Thus, a defendant who, absent the government's assistance, could have done no more than think about the crime should not be punished. To do otherwise would result in the punishment of a defendant who is not culpable.¹⁵⁵

Invoking the actus reus principle in defense of the positional predisposition requirement should not be done mechanically. In this case, however, such analogous reasoning is appropriate because both doctrines serve similar ends. For example, in the same way that the act requirement ensures penal efficiency by administering punishment only to those who have done "something

153. Ability should be independently determinative of predisposition, regardless of other factors indicating predisposition, because an individual who cannot satisfy the act requirement is not culpable. Thus, no matter how criminally eager an individual may seem in certain respects, an inability nullifies any culpability that the individual may have. Some courts and commentators disagree, suggesting that inability, if it is to be considered at all, should be only one of several factors to be considered in determining predisposition. See *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) ("A person's ability to commit a crime may illustrate her predisposition to do so, but should not become a separate element to be proven."); see also Rankin, *supra* note 10, at 1513; Rothstein, *supra* note 10, at 326-27 ("If the Hollingsworth court had utilized 'readiness' as one of several factors pertinent to the determination of predisposition, but not as separate as a separate and independent prong of the entrapment analysis, then these other factors would have clearly demonstrated the existence of predisposition.") (footnotes omitted). These comments fail to justify a finding of culpability for defendants who are not independently capable of satisfying the actus reus requirement.

154. As stated in note 61, *supra*, the ability to act is used in its strictest sense at this point in the Note. It is understood, of course, that a defendant may have enough ability to attempt the crime, but not enough ability to complete the crime. Thus, on one level, it is improper to speak of ability and inability as black and white, since there are many varying shades of gray. Indeed, in Part IV, this Note argues that punishment is warranted for the many occasions where a defendant is unable to complete the crime, but still able to attempt the crime. This Part only argues that ability is probative of culpability, not that inability should be exculpatory in all cases.

155. See generally Carlson, *supra* note 135 (arguing that criminal encouragement by police officers diminishes the threshold of the actus reus in entrapment cases).

that deserves punishment,"¹⁵⁶ the criminal ability requirement in predisposition analysis ensures efficiency by punishing only those who could do "something that deserves punishment." Without such a rule, judicial and law enforcement resources are wasted.¹⁵⁷

In the same way that the actus reus requirement prevents the state from arbitrarily or maliciously choosing who to prosecute, requiring independent criminal ability for an entrapment defendant ensures that the state cannot create crime.¹⁵⁸ Without the requirement of criminal ability in entrapment cases, government agents of sophisticated training could have the freedom to coax, and even coerce, citizens into crimes.

Thus, the positional predisposition inquiry is appropriate in entrapment cases. The inquiry is consistent with the purpose of the entrapment defense, consistent with established methods of predisposition evaluation, and consistent with the act requirement in criminal law. This Note now turns to a question that the above argument begs: how unable must a defendant be to warrant exculpation?

156. Id. at 1054.

157. In *United States v. Kaminski*, Judge Posner, commented on the penal efficiency aspect of the subjective approach to the entrapment defense:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime.

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

158. In the Seventh Circuit's first opinion on *United States v. Hollingsworth*, Judge Posner reviewed a portion of the rationale for the entrapment defense that highlights this concern:

We have said that the doctrine's purpose 'is to prevent the police from turning a law-abiding person into a criminal,' from corrupting him, in other words. 'The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.' 'The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law.'

A person who would not commit a crime unless induced to do so by the government is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character.

United States v. Hollingsworth, 9 F.3d 593, 597-98 (7th Cir. 1993), *aff'd en banc*, 27 F.3d 1196 (7th Cir. 1994) (en banc) (internal citations omitted).

IV. THE SCOPE OF EXCULPATION FOR INABILITY

Although ability is probative of culpability in entrapment cases, it is improper to assert that all unable defendants are not culpable. Indeed, the law has long recognized, through attempt law, that defendants who are unable to complete their crimes are still somewhat culpable.¹⁵⁹ Thus, mere inability to complete a crime should not automatically be exculpatory in entrapment cases. Rather, unable criminals who are nonetheless culpable should still be punished. In attempt law, criminals unable to complete their crimes are evaluated for culpability through the use of the impossibility doctrine. Thus, the impossibility doctrine is a useful template for determining the scope of exculpation for inability in entrapment cases.

This Part of the Note argues that an independently unable defendant in an entrapment case should be exonerated only when such inability would be grounds for invoking an impossibility defense if prosecuted for an attempt of the same crime. To defend this assertion, this section begins by discussing the impossibility doctrine, its various categories, and the factual parameters of each. With the impossibility doctrine fully presented, a comparison will then be made between the predisposition inquiry and the impossibility defense. This comparison will lead to the conclusion that, because both doctrines are dedicated to the same purposes, impossibility can fairly serve as a template for evaluating the scope of exculpation in questions of positional predisposition. Then, using the current law under impossibility, the proper scope of exculpation for unable defendants in entrapment cases will be fashioned. Finally, using this newly-fashioned rule, the *Hollingsworth* decision will be reevaluated.

A. *The Purpose of the Impossibility Defense*

Like the entrapment defense, the purpose of the impossibility defense is one of sorting—it sorts the culpable defendant from the nonculpable. Two exemplary cases, which are described more fully in subsequent sections, demonstrate this purpose.

159. See generally GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, 472-83 (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 125-35 (1968); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 *RUTGERS L.J.* 725, 734 (1988).

Suppose that an individual has decided to take the life of another. To effect this desire, the assailant procures a gun, tracks down the victim, and presses the gun's barrel to the victim's head. With full intent for death to occur, the assailant pulls the trigger, and is surprised by an anti-climatic "click"; the gun was not loaded. Although murder with an unloaded gun is "impossible," the law is clear that an impossibility defense is unavailable in such circumstances.¹⁶⁰

Compare this case to that of another assailant: a witch doctor. In this case, the witch doctor, desiring the death of another, employs a voodoo doll and several needles to accomplish his goal. Of course, no death occurs. Although this murder was just as impossible as the one in the above example, many courts would grant an impossibility defense to this assailant.¹⁶¹

Why grant an impossibility defense in one impossible attempt but not another? The answer lies in the perceived culpability of the defendant. In the first case, the defendant clearly manifested her culpability by wanting the victim to die (evidencing a *mens rea*) and pulling the trigger (evidencing an *actus reus*). In the second case, the culpability of the defendant is doubtful. Although the assailant acted by pushing needles into the doll, the presence of a meaningful *mens rea* is doubtful because anyone who truly intended death would use something more efficacious than a doll and needles.¹⁶²

Thus, viewing the above examples together, the impossibility defense appears to be available to defendants with doubtful culpability and is not available to defendants who are clearly culpable.¹⁶³ Seen in this way, the purpose of the impossibility defense, like the entrapment defense, is one of sorting: it sorts the

160. See, e.g., *State v. Damms*, 100 N.W.2d 592 (Wis. 1960). See Part IV.B for further impossible attempts where an impossibility defense is not available.

161. This hypothetical is often cited as the paradigmatic example of an inherently impossible attempt. See, e.g., *Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933).

162. Of course, the logical retort to this assertion is that anyone who "truly intended death" would check to make sure her gun was loaded—suggesting that the defendant in the first example was not truly culpable. As is described in Part IV.C.1-2, *infra*, courts, in applying the impossibility defense, differentiate between mere lackadaisical execution of a crime and a ludicrous misapprehension of means needed to commit a crime. A ludicrous misapprehension of means raises serious doubts about the defendant's intent that mere lackadaisicalness does not.

163. See HALL, *supra* note 142, at 591-94; LAFAVE & SCOTT, *supra* note 59, § 60, at 441; 1 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 85(a), at 423 (1984) ("[T]he actor's personal culpability, the harmfulness of his conduct, and his dangerousness . . . determines the availability of the impossibility defense."); 4 CHARLES E. TORCIA, 4 *WHARTON'S CRIMINAL LAW* § 699, at 633-37 (15th ed. 1996).

culpable from the nonculpable. To deal with the many permutations of impossible attempts, courts have established three categories of impossibility: factual impossibility, hybrid legal impossibility, and inherent impossibility.¹⁶⁴ These categories will now be discussed.

B. When Impossibility is Not a Defense: Factual and Hybrid Legal Impossibility

1. Factual Impossibility

Factual impossibility exists when a person's intended end is the commission of a crime, but attendant circumstances beyond that person's control or unknown to the person prevent the crime's consummation.¹⁶⁵ The most common examples include: a pickpocket who attempts to steal from an empty pocket;¹⁶⁶ a defendant who attempts to shoot another person with an unloaded gun;¹⁶⁷ and a doctor who attempts an abortion on a woman who is not pregnant.¹⁶⁸ In each of these cases, had the circumstances been as the perpetrator believed they would be, the crime would have been consummated.

With the exception of a short period in the mid-nineteenth century,¹⁶⁹ common law courts have refused to allow factual impos-

164. A fourth type of impossibility, pure legal impossibility, has been recognized as a valid defense by many courts. See, e.g., *Wilson v. State*, 38 So. 46 (Miss. 1905). Such a defense is available "when the law does not proscribe what the defendant sought to achieve." Ira P. Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 389 (1986). See also HALL, *supra* note 142, at 595. The legal impossibility defense has been omitted from this Note because, as many have recognized, it is not really an impossibility defense. Rather, "[t]he reason for not convicting [the defendant] has nothing to do with the failure of the enterprise, but rather with the absence of any prohibition of the conduct whether completed or not." Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1006 (1967).

165. See LAFAYE & SCOTT, *supra* note 59, § 60, at 440-42; see also *United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973); see generally Robbins, *supra* note 164.

166. See *People v. Fiegelman*, 91 P.2d 156, 157 (Cal. Dist. Ct. App. 1939); *People v. Moran*, 25 N.E. 412, 413 (N.Y. 1890); *People v. Jones*, 9 N.W. 486, 486-87 (Mich. 1881); *Commonwealth v. McDonald*, 59 Mass. (5 Cush.) 365, 366 (1850).

167. See *State v. Damms*, 100 N.W.2d 592, 593 (Wis. 1960).

168. See *People v. Cummings*, 296 P.2d 610, 612 (Cal. Dist. Ct. App. 1956), and *People v. Huff*, 171 N.E. 261, 262 (Ill. 1930), both decided when abortion was illegal.

169. See FLETCHER, *supra* note 159, at 137 (noting temporal approval of the defense by English courts).

sibility as a defense.¹⁷⁰ In the Model Penal Code as well, factual impossibility has been abolished as a defense.¹⁷¹ The presumption behind such decisions is that the defendant has "plainly manifested"¹⁷² his or her culpability and is thus "just as much in need of restraint and corrective treatment as the defendant who did not meet with the unanticipated events which barred successful completion of the crime."¹⁷³

2. Hybrid Legal Impossibility

As the name implies, this type of impossibility involves a combination of concepts. A claim of hybrid legal impossibility arises if the defendant makes a factual miscalculation regarding the legal status of an attendant circumstance.¹⁷⁴ For example, if a person wishing to pick the pocket of another mistakenly picks the pocket of a stone statue, the perpetrator has made a miscalculation regarding the legal status of the statue: the perpetrator thought the statue was a human, but according to the law, such an object has no human status.¹⁷⁵ Similar examples that have been noted include: a person who tries to hunt deer out of season by shooting a stuffed animal;¹⁷⁶ a person who shoots a tree stump believing that it is a human;¹⁷⁷ or a person who shoots a corpse believing that it is alive.¹⁷⁸

For the most part,¹⁷⁹ the defense of hybrid legal impossibility has been abolished in the common law¹⁸⁰ and under the Code.¹⁸¹ This

170. See *United States v. Sobrilski*, 127 F.3d 669, 674 (8th Cir. 1997) (stating that factual impossibility is not a defense to an attempt crime); *United States v. Cotts*, 14 F.3d 300, 307 (7th Cir. 1994) (same); *United States v. Contreras*, 950 F.2d 232, 237 (5th Cir. 1991) (same).

171. See MODEL PENAL CODE, *supra* note 102, § 5.01 (1) ("A person is guilty of an attempt [if he] purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be . . .").

172. *Id.* § 5.01 cmt. 3(a), at 309.

173. LAFAVE & SCOTT, *supra* note 59, § 60, at 441.

174. See *United States v. Hsu*, 155 F.3d 189, 199 n.16 (3d Cir. 1998) (acknowledging that certain types of legal impossibility are often termed "hybrid" legal impossibility).

175. See *Trent v. Commonwealth*, 156 S.E. 567, 569 (Va. 1931) (dictum).

176. See *State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953).

177. See *id.* at 156; *Regina v. M'Pherson*, 7 Cox Crim. Cas. 281, 284 (1857); *Rex v. Osborne*, 84 J.P. 63, 64 (Central Crim. Ct. 1919).

178. See *State v. Taylor*, 133 S.W.2d 336, 341 (Mo. 1939) (dictum); *Guffey*, 262 S.W.2d at 156.

179. The defense of hybrid legal impossibility has been retained by the Third Circuit. See *Hsu*, 155 F.3d at 199-200; *United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973).

180. According to the American Law Institute, very little support for the hybrid legal impossibility defense can be found anywhere. See MODEL PENAL CODE, *supra* note 102, § 5.01 cmt. 3(b), at 317.

181. See *supra* note 171.

is because of its implicit similarity to factual impossibility.¹⁸² The same presumption made in factual impossibility cases is appropriate here as well: defendants are culpable because, had the circumstances been as the defendant hoped they would be, the crime would have been committed.¹⁸³ While cases of hybrid legal impossibility involve a miscalculation that is legally based, the miscalculation is, at heart, still factual. Whether a stump appears to be a stump or a person is a question of fact, not of law.

C. *When Impossibility is a Defense: Inherent Impossibility*

Despite courts' refusal to grant an impossibility defense in most circumstances, certain cases of "inherent impossibility" are commonly excepted. A claim of inherent impossibility (sometimes referred to as "inherent factual impossibility"¹⁸⁴ or "obvious impossibility"¹⁸⁵) arises when a defendant employs a means to commit a crime which an ordinary person would view as totally inappropriate for the objective sought.¹⁸⁶ An oft-cited example is that of a witch doctor who sought to kill his victim by puncturing a voodoo doll with a needle.¹⁸⁷ In this example, the defendant had a clear intent to complete the crime, committed the act as planned, but, like cases of factual and hybrid legal impossibility, was mistaken in his assessment of the necessary means. Thus, inherent impossibility sometimes garners its "factual" modifier because, at its heart, the miscalculation is still a factual mistake.¹⁸⁸ Inherent impossibility, however, is maintained as a separate category of impossible attempts because of the degree of miscalculation committed by the defendant.

A comparison of two cases illustrates this point. In *Kunkle v. State*, a defendant attempted to kill another person, but used a

182. See *Hsu*, 155 F.3d at 199 ("[T]he great majority of jurisdictions have now recognized that [hybrid] legal and factual impossibility are 'logically indistinguishable'" (quoting *United States v. Darnell*, 545 F.2d 595, 597 (8th Cir. 1976)); see also *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978); *United States v. Duran*, 884 F. Supp. 577, 580 n.5 (D.D.C. 1995) (noting that "categorizing a case as involving legal versus factual impossibility is difficult, if not pointless") *aff'd* 96 F.3d 1495 (D.C. Cir. 1996)

183. See *supra* note 173.

184. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07[C], at 370 (2d ed. 1995).

185. See TORCIA, *supra* note 163, § 698.

186. See LAFAVE & SCOTT, *supra* note 59, § 60, at 445.

187. See *Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933) (dicta).

188. See DRESSLER, *supra* note 184, at § 27.07[C].

bullet that was not lethal from the distance it was shot.¹⁸⁹ The court denied any defense of factual impossibility and convicted the defendant of attempted murder.¹⁹⁰ Compare this to a hypothetical case presented in *State v. Logan*.¹⁹¹ The court suggested that, had the defendant attempted to “sink a battleship with a popgun,” no conviction would be warranted because such an act is so inherently unlikely to result in the harm intended.¹⁹² These two cases share one important characteristic: both perpetrators chose a means that was insufficient to complete their intended crimes. One defendant, however, was punished and the other exonerated. The reason for the difference lies in the degree of miscalculation. While the first perpetrator merely made a casual misjudgment regarding his means, the second made an egregious, indeed ludicrous, misassessment of his means.

At this point, it is essential to clarify the proper meaning of “inherently impossible.” To do that, consider the case *State v. Glover*.¹⁹³ *Glover* involved a girl who attempted to kill a seventeen-month-old infant.¹⁹⁴ She heard that one drop would be lethal, and thus administered the drug to the infant.¹⁹⁵ Focusing only on her act, a court might logically conclude that the attempt was “inherently impossible,” suggesting that she was not culpable. But viewing her act in light of the circumstances as she saw them, namely that she was under the reasonable impression that the substance would be lethal, her act suggests that she indeed was culpable. Finding her guilty of attempted murder, the court agreed, stating:

There being testimony to the effect that the defendant had heard that the drug was poisonous, and that a very small portion of it—one drop—would kill, it was wholly immaterial to inquire whether the drug was in fact poisonous. . . . If the defendant administered the drug with intent to kill, after having heard that it would have that effect, all the elements of the offense charged were present. . . . [T]he fact that the act done by her fell far short of effecting her intent cannot affect the question.¹⁹⁶

189. See *Kunkle v. State*, 32 Ind. 220, 224-25 (1869).

190. See *id.* at 227-28.

191. *State v. Logan*, 656 P.2d 777, 779 (Kan. 1983).

192. See *id.*

193. *State v. Glover*, 4 S.E. 564 (S.C. 1888).

194. See *id.* at 564.

195. See *id.* at 564-66.

196. *Id.* at 565-66.

Thus, the proper conception of inherent impossibility contains a component of reasonableness, or extreme unreasonableness to be more accurate.¹⁹⁷ If the defendant acted with the reasonable expectation that the act would cause harm, such an act should not be considered inherently impossible, no matter how unlikely the desired result.¹⁹⁸ On the other hand, if a defendant acted with an extremely unreasonable belief in the efficacy of her act, then it should be considered an inherently impossible attempt.

To further illustrate this point, suppose a perpetrator has just read in a renowned medical journal that aspirin, when mixed with coffee, is lethal. Although, in actuality, murder in such a fashion is "inherently impossible," the perpetrator should not be exculpated. The perpetrator's belief is reasonable given the prior perusal of the medical journal.¹⁹⁹ On the other hand, a perpetrator acts extremely unreasonably in attempting to sink a battleship with a pop gun. The "reasonableness" component is essential because it permits the court to infer that the aspirin murderer, as compared to the battleship stalker, has a true intent and is thus a culpable individual. Had the aspirin murderer picked up a copy of *Soldier of Fortune* instead of the *New England Journal of Medicine*, a death surely would have occurred. Thus, it is perhaps more accurate to refer to "inherently impossible" attempts as "inherently unreasonable and impossible" attempts.

197. See Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 850-51 (1928) ("[T]he unsuccessful effort to achieve a criminal consequence should be punished if, and only if, a reasonable man in the same circumstances as the defendant might expect the defendant's acts to cause the consummation of the crime."); see also Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. L. REV. 237, 251-56 (1995) (arguing the merits of a reasonableness standard in inherent impossibility cases). But see HALL, *supra* note 142, at 593 (arguing that sometimes "normal persons take an extremely marginal chance of successfully committing a harm, e.g., shooting at someone 1000 feet away with a bow and arrow").

198. See, e.g., *State v. Smith*, 621 A.2d 493, 510-11 (N.J. Super. Ct. App. Div. 1993) (rejecting an inherent impossibility defense for a HIV-positive defendant on trial for attempted murder after biting another under the belief that a bite could transmit the lethal virus).

199. This example is borrowed from Kyle S. Brodie, as published in the Northern Illinois Law Review. See Brodie, *supra* note 197, at 249. Despite the importance of the reasonableness component, some state statutes fail to include it. For instance, Minnesota allows an impossibility defense if "such impossibility would have been clearly evident to a person of normal understanding." MINN. STAT. ANN. § 609.17(2) (West 1987). Written as such, the statute would not convict the aspirin murderer.

1. The Presumption Behind the Inherent Impossibility Defense

The inherent impossibility defense presumes that the ludicrous nature of the defendant's act indicates that the defendant had no true intent and is therefore not culpable. Such a conclusion, however, may not be immediately obvious; after all, the proverbial witch doctor wanted death to occur and pushed a needle through a doll to effectuate that desire. Such facts seem to satisfy the mens rea and actus reus requirements. A closer analysis reveals, however, that the existence of a mens rea is doubtful at best.²⁰⁰

In criminal law, a defendant's mens rea is often inferred from the act committed.²⁰¹ In cases of inherent impossibility, courts reason that, because the means chosen by the defendant were so ludicrous for the purpose sought, the defendant presumably had no mens rea to commit the crime. Put another way, anyone with a real intent to sink a battleship, for example, would use more than a pop gun; thus, if a pop gun were used, the defendant could not have had a real intent to cause the result and therefore cannot be deemed culpable. As the American Law Institute has stated: "if the means selected were absurd, there is good ground for doubting that the actor really planned to commit a crime."²⁰²

At this point, a fair criticism of the presumption behind the inherent impossibility defense must be fielded. Critics point out that "there is danger to the public in leaving uncorrected a man who is bent on murder"²⁰³ presumably because "[t]he voodoo witch-doctor may use a gun next time."²⁰⁴ The crux of this criticism is that "extreme mistakes regarding the external world" may indicate a "severe mental disorder," and thus a possible danger to the public which warrants incarceration.²⁰⁵ This criticism fails because, as Professor Hall correctly observed, "segregation of dangerous psychotics is quite different from punishment for a criminal

200. See Sayre, *supra* note 197, at 850-51.

201. See *supra* notes 142-43.

202. See MODEL PENAL CODE, *supra* note 102, § 5.01 § 5.01 cmt. 3(b), at 315; see also Brodie, *supra* note 197, at 246-47 ("In determining the actor's intent, we start with his actions, and then swing across a canyon of inference, landing at his probable intent; if the actions are absurd, then the gap between action and intent becomes too wide to cross.").

203. WILLIAMS, *supra* note 145, § 207(b), at 645.

204. Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 33 (1968).

205. HALL, *supra* note 142, at 592.

attempt."²⁰⁶ Under the long-established tenets of criminal law, punishment for a crime can only proceed upon a finding of culpability, not merely a finding of dangerousness.

2. The State of Inherent Impossibility Law

There is a paucity of cases defining the law of inherent impossibility because the doctrine deals only with cases of very extenuated fact patterns. Nevertheless, the cases that do exist on the subject support the availability of the defense.²⁰⁷ Further, by combining the case law with legislative pronouncements and scholarly commentary, it becomes clear that inherent impossibility is an accepted defense in attempt cases.

Early cases, while not mentioning inherent impossibility by name, implicitly recognized the concept. For example, in *Attorney General v. Sillem*, the court commented on whether attempted murder through witchcraft could be prosecuted: "[A]n attempt [to kill] by means of witchcraft . . . would not be an offence within [a statute prohibiting attempted murder]."²⁰⁸ The court reasoned that, while "[I]t is true the sin . . . may be as great as an attempt . . . by competent means," laws are not written to "punish sin, but to prevent crime and mischief."²⁰⁹ Consider also a case of a murder attempt foiled by an innocuous poison. Judge Oliver Wendell Holmes, Jr., then serving on the Supreme Judicial Court of Massachusetts, commented that "[u]sually, acts which are expected to bring about the end without further interference on the part of the criminal are [grounds for an attempt conviction], *unless the expectation is very absurd*."²¹⁰ Later cases continued to hold that very low probability attempts would not be punished. For example, in *Dahlberg v. People*, the court commented that an "[attempt] is complete if the means employed appeared . . . adequate; but, if the

206. *Id.*; see also MODEL PENAL CODE § 5.05, A.L.I. PROC., at 413-14 (1960) ("In order to meet [the problem of inherently impossible attempts] we extended the normal power of the court to reduce the grade of to the point of permitting the court—in cases where there really is a finding of no danger—to dismiss conspiracy to kill by incantation, hex murderers and so on.") (Professor Weschler commenting).

207. It is arguable that judicial disapproval of the inherent impossibility defense could be "silently" manifested through the absence of its application in cases of unreasonable attempts. But judicial denial of the defense on such grounds would necessarily be a question of fact, not of law. No evidence exists of a court repudiating the defense as a matter of law.

208. *Attorney General v. Sillem*, 159 Eng. Rep. 178, 221 (Ex. D. 1863).

209. *Id.*

210. *Commonwealth v. Kennedy*, 48 N.E. 770, 770 (Mass. 1897) (emphasis added).

means are both absolutely and apparently inadequate, then the attempt does not exist.”²¹¹ In addition, a Virginia court reasoned in 1931: “[I]t is sufficient to say that, if the instrumentalities adopted were apparently suitable for the consummation of the crime, that is enough. If they were manifestly insufficient, then this prosecution is at an end.”²¹² Since these cases, the defense of inherent impossibility has been recognized, if not always applied, by many state and federal courts.²¹³

Many state legislatures have joined the judiciary in deciding that inherently impossible attempts should not be punished. For example, the Minnesota legislature provided a defense to a defendant who made an impossible attempt if “such impossibility would have been clearly evident to a person of normal understanding.”²¹⁴ Other legislatures followed Minnesota’s lead, agreeing that “inherent impossibility ([for example,] attempt[ing] to kill by witchcraft such as repeatedly stabbing a cloth dummy made to represent the person intended to be killed) is . . . a defense.”²¹⁵ Most notably, the American Law Institute endorsed the doctrine of inherent impossibility in its Model Penal Code. Although the Institute abolished the

211. *Dahlberg v. People*, 80 N.E. 310, 311 (Ill. 1907) (holding that an attempt to blind a person by throwing red pepper into their eyes was an inherently impossible attempt).

212. *Trent v. Commonwealth*, 156 S.E. 567, 569 (Va. 1931).

213. *See Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933) (“[H]exing’ with lethal intent, belongs to the category of ‘trifles,’ with which ‘the law is not concerned.’ ”); *see also United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979) (recognizing inherent impossibility as a defense, but refusing to grant the defense on the facts of the case); *United States v. Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973) (describing inherent impossibility as one of the three types of impossibilities); *Parham v. Commonwealth*, 347 S.E.2d 172, 174 (Va. Ct. App. 1986) (“All the authorities hold that in order to constitute an attempt the act attempted must not be impossible, but this rule has reference to inherent impossibility. . . .”); *State v. Logan*, 656 P.2d 777, 779-80 (Kan. 1983) (recognizing that, although the Kansas legislature had abolished legal impossibility as a defense, the defense of inherent impossibility remained available); *People v. Elmore*, 261 N.E.2d 736, 737 (Ill. App. Ct. 1970) (“An inherent impossibility is, of course, a defense.”); *People v. Richardson*, 207 N.E.2d 453, 456 (Ill. 1965) (suggesting that inherent impossibility, as distinguished from factual impossibility, is a defense to an attempt charge).

214. MINN. STAT. ANN. § 609.17(2) (West 1987).

215. JOINT COMM. TO REVISE THE ILL. CRIMINAL CODE, TENTATIVE FINAL DRAFT OF THE PROPOSED ILLINOIS REVISED CRIMINAL CODE OF 1961, 212 (1960). In addition to Illinois, many other states have codified inherent impossibility doctrine, permitting it either as a full defense or as a mitigating factor to be used in sentencing. *See MONT. CODE ANN. § 45-4-103* (1999) (“It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted. . . . An example of inherent impossibility would be an attempt to kill by witchcraft and is not intended to be excluded as a defense.”); *see also COLO. REV. STAT. § 18-2-206(3)* (1978); N.D. CENT. CODE § 12.1-06-01(1) (1997); N.J. STAT. ANN. § 2C:5-4(b) (West 1982); 18 PA. CONS. STAT. ANN. § 905(b) (West 1998). But *see ALA. CODE § 13A-4-2(b)* (1994), GA. CODE ANN. § 16-4-4 (1999), and HAWAII REV. STAT. ANN. § 705-500(1)(a)-(b) (Michie 1999), all declining to adopt the inherent impossibility section of the Model Penal Code.

defense of factual and hybrid legal impossibility, the Institute expressly retained the concept of inherent impossibility. Although not retained as a defense,²¹⁶ it was preserved nonetheless by empowering judges to reduce the defendant's penalty or dismiss the charges if, in the court's discretion, the "particular conduct [of the defendant] . . . is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger"²¹⁷

In addition to courts and legislatures, major criminal law commentators have recognized the existence of an inherent impossibility defense. For example, Jerome Hall has supported the defense, arguing that punishment should only follow when the defendant's actions have created an objective risk of harm.²¹⁸ Professor Perkins has concurred, stating that "an attempt will not be recognized if success was obviously impossible—as if an effort is made to kill another by witchcraft."²¹⁹ Charles Torcia agrees as well, stating simply in *Wharton's Criminal Law* that "case[s] of obvious impossibility . . . will not ordinarily be recognized [as prosecutable attempts]."²²⁰ While the defense has been criticized as illogical in some respects,²²¹ commentators who do not openly support it still recognize it as a valid defense in the law.²²²

In reviewing the doctrine of impossibility as a whole, it is clear that attempt defendants are afforded only a very narrow defense. When a defendant has made a routine miscalculation of attendant circumstances, as in cases of factual or hybrid legal impossibility, no defense is available. It is only when a defendant has made an exceedingly unreasonable miscalculation of circumstances as to make the attempt impossible is the defense available.

216. See MODEL PENAL CODE, *supra* note 102, § 5.01 § 5.01 cmt. 3(b), at 315-16.

217. MODEL PENAL CODE, *supra* note 102, § 5.05(2).

218. See HALL, *supra* note 142, at 591-594.

219. See RONALD M. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 490 (1957).

220. See TORCIA, *supra* note 163, § 698, at 632.

221. See WILLIAMS, *supra* note 145, at 651-53; FLETCHER, *supra* note 159, at 175-77.

222. See LAFAYE & SCOTT, *supra* note 59, § 60, at 445-46; ROBINSON, *supra* note 163, at 434-35.

D. Applying the Impossibility Defense to the Positional Predisposition Inquiry: Defining the Scope of Exculpation for Inability in Entrapment Cases

Part III of this Note established that independently unable defendants should be exculpated in entrapment cases. This Part then undertook the task of defining the appropriate parameters of "unable." Part IV.A began this task by defining the purpose of the impossibility defense. By showing that the entrapment and impossibility defenses have similar purposes, this section demonstrated that the impossibility defense can fairly inform a determination of the limits of exculpation for inability in entrapment cases. Parts IV.B and IV.C then undertook an extensive explanation of the three categories of impossibility, concluding that impossibility is available as a defense only in a very narrow category of cases: inherently impossible attempts. This Section now applies the impossibility doctrine to the positional predisposition question to define the scope of exculpation for inability in entrapment cases.

The inability of a defendant in an entrapment case should be exculpatory inasmuch as the inability would warrant an impossibility defense in cases of criminal attempt for the same crime. As made clear above, an inability to complete a crime is only exculpatory in attempt cases when the defendant has acted extremely unreasonably in making an impossible attempt. Thus, defendants in entrapment cases unable to independently complete their crime should only be exonerated when their independent attempt at the same crime could be characterized as an inherently impossible attempt.²²³

This rule has one drawback that relates to the peculiar circumstances surrounding the entrapment of unable defendants. To illustrate, consider the example of a willing, but unable, counterfeiter of currency. Such a person, if unable to undertake the complex process of counterfeiting, is no threat to counterfeit on her own. But after being approached and coached by the government, such a person may develop the ability to commit the crime. Thus, to release such a defendant because she did not have the independ-

223. Because the exculpation of the defendant hinges on the inherent impossibility defense, it is conceivable that exculpation could vary according to jurisdiction, depending on which jurisdiction offers the defense. Nonetheless, such variance is likely to be slight, if at all. There is no record of any court rejecting the inherent impossibility defense as a matter of law, and most jurisdictions only lack precedent due to the uncommon factual nature of the cases.

ent ability to commit the crime when approached by the government would be to release a very willing, and now able, defendant.

This drawback, however, is de minimis at most. As has already been explained, the number of instances in which an attempt can be classified as an inherently impossible attempt is extremely small.²²⁴ An exhaustive computer and digest search produces only a handful of cases which even consider the inherent impossibility defense, much less grant it. Smaller still is the number of inherently impossible attempters who will actually become fully competent in the abilities needed to commit their crime. To have the government coach you through a complicated counterfeiting scheme does not, *a priori*, mean that you will garner enough ability to commit the crime on your own. Of course, a very few may, during their entrapment experience, progress from idiot to expert. The disutility of exculpating such defendants, however, is far outweighed by the utility of consistently punishing the many clumsy but less-than-ridiculously-unable defendants.

Thus, the complete rule on the exculpation of entrapment defendants for inability should be: a defendant claiming entrapment shall be exculpated if, viewing the defendant's inability in an attempt context, a defense of inherent impossibility would be available.

E. A Fresh View of Hollingsworth Under the Impossibility Approach

This Section covers two matters. First, it attempts to reconcile the positional predisposition standard applied in *Hollingsworth* with the rule proffered in this Note. This reconciliation reveals that the *Hollingsworth* standard is consistent with principles of inherent impossibility. However, the analysis also reveals that the court faltered by failing to enunciate the specific parameters of exculpation for inability that the inherent impossibility rule dictates in such cases. Second, this Section will reevaluate the *Hollingsworth* case under the standard presented in this Note. This evaluation reveals that Pickard and Hollingsworth belong in jail.

Although the court did not in any way allude to the inherent impossibility concept, it is clear that the court was unconsciously applying a similar standard. In the opinion, Judge Posner stated

224. See *supra* notes 184-99 and accompanying text.

that the case should not 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.”²²⁵ Rather, government inducement should only “affect[] the timing of the offense,” not the actuality of the offense’s commission.²²⁶ As an example, Posner suggested that, had a government agent offered a boat dealer’s address to a criminal looking to commit a crime with a boat, the defendant would have no entrapment claim based on positional predisposition because the agent merely altered the timing of the offense, not the actuality of its commission.²²⁷

These explanations from the case suggest that the Seventh Circuit recognized, albeit unconsciously, the distinction between factual impossibility and inherent impossibility discussed in this Note. Similar to the standard advocated in Part IV, the Seventh Circuit recognized that a case of simple factual impossibility would not be grounds for exoneration.²²⁸ On the other hand, because the court exonerated these two defendants because of their egregious level of inability (“Pickard and Hollingsworth had no prayer of becoming money launderers . . .”), the court implicitly recognized that the inherent impossibility of independent completion is exculpatory.²²⁹

Despite its acceptance of inherent impossibility principles, the *Hollingsworth* court nonetheless failed to enunciate a standard that comported with the precise parameters of the inherent impossibility defense. As this Note has belabored, a defense of inherent impossibility is available only when the means selected for the attempt are ludicrously insufficient from the viewpoint of a reasonable person. In comparison to this rule, the *Hollingsworth* court promulgated a rule of considerable less clarity: the defendant is predisposed if “it is *likely* that if the government had not induced him . . ., some criminal would have done so . . .”²³⁰ This statement necessarily implies that a defendant is *not* predisposed if she was *unlikely* to be induced by other criminals to commit the crime. But the inherent impossibility defense is not available to those who merely make “unlikely” attempts; it is available only for attempts

225. United States v. Hollingsworth, 27 F.3d 1196, 1202 (7th Cir. 1994) (en banc).

226. *Id.* at 1203.

227. *See id.* at 1202-03.

228. “[L]ack of *present* means to commit a crime is [not] enough to establish entrapment if the government supplies the means.” *Id.* at 1202.

229. *Id.*

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

that are patently ludicrous—again, the example of the witch doctor is exemplary. Thus, although the *Hollingsworth* court captured the spirit of the inherent impossibility test, it failed to properly enunciate it.

Had the court explicitly relied on the test I have proposed, it is likely that Pickard and Hollingsworth would have been found guilty. Most would agree that the two “tyros” would have been unlikely players in the international money laundering business. But the succinct question is not the unlikeliness of their success, but the unreasonableness of their attempt—an unreasonableness that, according to inherent impossibility law, must rise to the level of absurdity. While I have never met the two defendants, I find it implausible that their independent attempt at money laundering would have been an inherently impossible attempt. Pickard and Hollingsworth knew enough to open an international bank;²³¹ they knew how to “clean and polish” money;²³² and they knew how to set up discreet meetings and screen for undercover police.²³³ Clearly, these two possessed abilities more effectual than a BB gun-wielding battleship stalker.

V. CONCLUSION

Although Supreme Court precedent on entrapment is voluminous, it does not speak to the positional predisposition issue. Thus, a determination of the issue’s merits can be made only through analogizing to other, more settled, areas of criminal law. Accordingly, this Note reviewed relevant criminal law doctrines, such as the act requirement and the impossibility defense.

Because the entrapment defense is designed to sort out defendants who are not culpable from those who are, any factor that sheds light on a defendant’s culpability is useful to the court. Few factors could be more definitive of culpability than a defendant’s ability to commit a crime, for without it, the actus reus requirement cannot be satisfied. Thus, courts hearing entrapment cases are justified in evaluating the ability of the defendant.

In addition, by analogizing to the impossibility defense, the scope of exculpation for inability can be clarified. The impossibility

231. *See id.*

232. *Id.*

233. *See id.* at 1201.

defense is a proper paradigm because, not only does it sometimes provide exculpation for inability, but it also does so for the same reasons that the entrapment defense does. The state of impossibility law thus suggests that exculpation for inability should be limited to only those cases in which the defendant would have an inherent impossibility defense in an attempt case.

*John F. Preis**

* My parents deserve special thanks for their constant predisposition to help me.