
Kelly Orlando
University of Nebraska College of Law

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Note

Kelly Orlando*


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I. INTRODUCTION

Undercover agents and sting operations are utilized as a means to effectively identify criminals and enforce the law.¹ The deception and inducement often involved in undercover operations is not in itself for-

bitten, but using law enforcement officials to induce an otherwise law-abiding citizen to commit a crime he or she would not have committed absent the government operation will often raise the issue of whether the defendant was entrapped. The entrapment defense is an affirmative defense asserted by individuals who, instead of challenging the existence of the elements which constitute the crime charged, alternatively argue that the methods of inducement used were such that absent government involvement, the individual would never have committed the crime. There are two elements involved in the assertion of the entrapment defense: inducement and predisposition. The first element of the entrapment defense, inducement, places the burden of proof on the defendant to demonstrate that inducement occurred. If the defendant is successful in carrying its burden, the second element, predisposition, shifts the burden to the prosecution and requires it to prove that the individual charged was predisposed to commit the crime.

The element of inducement is relatively easy to establish when undercover operations are involved, and in order to avoid wasting time in litigation, the government may not even challenge that inducement occurred. Consequently, the element of predisposition is generally the primary – if not the exclusive – focus when the entrapment defense is raised.

4. "Entrapment is an affirmative or positive defense that must be raised by the defendant." 21 AmJur 2d, Criminal Law § 203 (1981).
5. See Matthews v. United States, 485 U.S. 58, 63 (1988) (stating that "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."); J. Gregory Deis, Economics, Causation, and the Entrapment Defense, 2001 U. Ill. L. Rev. 1207, 1221 (2001) (pointing out that federal courts "continue to approach the entrapment defense under the two-step approach of inducement and predisposition.")
6. In Matthews, 485 U.S. 58, 62-63, 108 S.Ct. 883, 886, the Court stated that "the [Supreme] Court has consistently adhered to the view . . . that 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 criminal conduct."
7. See Poehlman v. United States, 217 F.3d 692, 702 (9th Cir. 2000) (referring to Supreme Court cases that have demonstrated inducement can be demonstrated by "very subtle" governmental pressure); State v. Canaday, 263 Neb. 566, 582, 641 N.W.2d 13, 26 (Neb. 2002) (recognizing the low burden placed on the defendant with respect to satisfying the inducement element and pointing out that this burden is met by bringing forth only a "mere scintilla" of evidence).
8. See Poehlman, 217 F.3d at 701 (referring to a previously decided Supreme Court case in which the government conceded inducement).
9. "Once government instigation is shown, the ultimate question is whether the inducement by the officers or the defendant's own predisposition caused the criminal conduct." 21 AmJur 2d, Criminal Law § 205 (1981).
Predisposition is most simply defined as a “readiness and willingness” to commit the crime charged. The use of such a broad definition could plausibly result in the predispositional element being easy to establish, especially when the question is being asked of a person who has admitted committing a crime. However, determining whether the prosecution has successfully carried its burden of proof with respect to establishing predisposition has generated substantial controversy.

Recently the Supreme Court of Nebraska reversed a decision by the Douglas County District Court convicting the defendant and rejecting his attempted assertion of the entrapment defense. Ronald Canaday was charged with conspiracy to commit sexual assault on a child after he participated in written correspondence and telephone conversations with an undercover agent posing as a single mother. The path Canaday took through the courts, beginning with the district court rejecting the entrapment defense and culminating (for now) in reversal by the Nebraska Supreme Court, demonstrates the need to come to some resolution on the controversial element of predisposition.

Although Canaday does not claim on its face to constitute any significant shift in the way the entrapment defense is treated in Nebraska, a close examination of the case in light of the opinions from the Supreme Court and other jurisdictions reveals that Canaday may constitute a movement toward requiring that the prosecution prove the presence of positional predisposition in order to meet its burden when the entrapment defense has been asserted. If the suggestion that the Nebraska Supreme Court is making the shift toward requiring the prosecution to prove positional predisposition is correct, the court should not stop at an unstated requirement. Instead, the court should take what it implicitly did in Canaday and make it an explicit requirement at its first opportunity.

This Note will examine the way the entrapment defense has been treated across jurisdictions. Specifically, this Note argues that the Canaday decision may show that the Nebraska Supreme Court has adopted the view taken by the United States Supreme Court and various other jurisdictions in requiring the prosecution to demonstrate positional predisposition if it is to successfully defeat an assertion of the entrapment defense. The Background section will first present infor-

10. See McLoughlin, supra note 1, at 1067 (stating that jury instructions generally define predisposition in this way).
11. “Courts disagree over whether the predisposition element requires that the government prove the defendant was in a position to commit the crime, even absent governmental involvement.” Id. at 1068 (emphasis added).
13. See id. at 568, 641 N.W. 2d at 17.
mation necessary to understand the elements and operation of the entrapment defense, and more specifically, the importance of the element of predisposition. This section will then trace the history of how the United States Supreme Court and the Eighth Circuit Court of Appeals have addressed the element of predisposition. This history will provide an illustration suggesting that these jurisdictions are making a shift toward requiring a showing of positional predisposition as part of the prosecution's burden when attempting to defeat an assertion of the entrapment defense. The Analysis section will focus on how this shift toward requiring a showing of positional predisposition has also been recognized by the Nebraska Supreme Court and the important implications this shift will have upon not only the burden of the prosecution, but also on the way that undercover operations are designed.

II. BACKGROUND

A. The Canady Case

On November 4, 1999, the Douglas County District Court in Nebraska convicted Ronald Canaday of conspiracy to commit first degree sexual assault on a child. Judge John D. Hartigan, Jr. acted as the trier of fact and entered an order sentencing Ronald Canaday to 5 years probation. Canaday appealed, and as the sole assignment of error, the defense claimed that the State "failed to prove beyond a reasonable doubt that the Defendant had not been entrapped, accordingly, there was insufficient evidence to find the Defendant guilty of the crime convicted." On March 29, 2002, the Nebraska Supreme Court reversed the conviction, holding that it was "clearly erroneous to conclude from this record that the State disproved entrapment beyond a reasonable doubt." Specifically, with respect to the element of predisposition, the court stated that "there [was] no evidence upon which a rational finder of fact could conclude that Canaday had a predisposition to commit the offense with which he was charged prior to and independent of the State's inducement." The case against Canaday developed during an undercover sting operation conducted by the Omaha Police Department. The operation was designed to identify those individuals with a sexual interest

14. See id.
18. Id.
19. See id. at 568, 641 N.W.2d at 17.
in children and willingness to make sexual contact with children.20 Canaday responded to a 1997 advertisement placed in an adult magazine21 that stated: "Lisa, pob 1829 Council Bluffs, Iowa 51502. Single mom looking for right man who likes kids and understands needs!"22

According to the testimony of Officer Steven Henthorn, the officer who corresponded with Canaday and posed as "Lisa," the advertisement was vague and open to interpretation with respect to the mentioning of children.23 Canaday responded on August 10, 1998 with a handwritten letter which included a physical description of himself, a request for a physical description of Lisa, and an indication that he would like to hear from Lisa soon. In this letter, there was no reference to children.24

Henthorn testified that there was nothing of significance in Canaday's first letter to Lisa,25 but that the next letter to Canaday referring to "special education" for Lisa's "sweethearts" was drafted with the specific purpose of reaching only those who have a sexual interest in children.26 In the correspondence that followed, Canaday expressed confusion with regard to what Lisa stated she was looking for in her letter.27 In the third letter written to Canaday, Henthorn testified the language clearly conveyed that Lisa's intention was to find someone who was willing to become sexually involved with her children.28

It was not until a letter written on October 21, 1998 that Canaday made any inquiry into whether the "special education" Lisa referred to in her letters involved sex.29 However, letters written to Lisa on November 18, 1998 and December 4, 1998 revealed continued uncertainty on the part of Canaday.30 Henthorn testified that despite the continued questions, both letters were significant because in them

21. The ad was placed in a magazine with "strong sexual content," State v. Canaday, 263 Neb. at 568, 641 N.W.2d at 17, but was characterized as an "adult swinging magazine for adult couples wanting to engage in sexual activity." Appellant's Brief at 3, Canaday (No. A-01-0150).
22. See id. at 568-69, 641 N.W.2d at 17.
23. See id. at 569, 641 N.W.2d at 17; Appellant's Brief at 4, Canaday (No. A-01-0150).
24. See Canaday, 263 Neb. at 569, 641 N.W.2d at 17.
25. Id. at 569-70, 641 N.W.2d at 18; Appellant's Brief at 4, Canaday (No. A-01-0150).
26. Canaday's confusion is illustrated by what he wrote: "Tell me what you are looking for? A friend? A mate? A partner? A husband? Your letter doesn't specify. Lisa, I'm trying to understand but there are a lot of questions I have to ask to help me understand. I hope you don't mind?" Appellant's Brief at 4-5, Canaday (No. A-01-0150).
27. In this letter, Canaday wrote: "Are you looking for a male partner? As a teacher along with you to teach your children about love and sex? . . . See, if you could answer these questions it would help my [sic] know what would be expected of
Canaday expressed comfort with and an interest in having sex with Lisa's children.  

In a letter written on December 14, 1998, Lisa stated that she was looking for something only for her children and that anything between Canaday and herself would upset the children. On January 4, 1999, Lisa wrote to Canaday and stated that the children “think hands-on teaching is best. You can use the bedroom or wherever you’re comfortable.” In the last letter written to Lisa, Canaday stated: “You asked – would I be comfortable teaching your children? It would be new for me but I think I could be comfortable with it if they are comfortable with me.”

On January 20, 1999, a woman officer posed as Lisa and made a telephone call to Canaday in which she again stated that she was only looking for a teacher for her children. In this recorded conversation, Canaday told Lisa that he was “new at this” and that he had “never tried it” before. During this conversation, Lisa asked for a written lesson plan and Canaday responded to the request by sending a letter which indicated that he would be involved in sexual contact, and eventually sexual intercourse, with the children. In another telephone conversation, Lisa asked Canaday if he had any tapes with “children learning” and Canaday said that the only tapes he had involved adults. In the final telephone conversation between Lisa and Canaday, they agreed on a time and place to meet and Canaday again “stated that he had never taught sex to children before and, when questioned by Lisa, further stated that he had never even thought about it before.”

On February 5, 1999, Canaday met a woman officer, who was posing as Lisa, in person and after a short conversation, he was arrested. Following a background check and search of Canaday’s home, no evidence of a sexual interest in children was found. However, Canaday consented to a search of his car at the hotel where officers discovered a bottle of baby oil, a box of unopened condoms, and a
Polaroid camera.42 Canaday denied that any of these things were going to be used with Lisa's children.43

At trial Canaday testified that he "responded to the magazine in order to meet Lisa, not with the intention of having sex with children."44 Additionally, Canaday testified that although he did convey to Lisa he would have sex with her children, he never thought she was serious and he only agreed to Lisa's requests in order to meet Lisa herself.45 Despite Canaday's testimony, the district court found Canaday guilty and indicated that the items found in his car during the search "strongly influenced" their decision.46

Canaday appealed the decision of the district court and on March 29, 2002, the Nebraska Supreme Court reversed his conviction.47 After a brief discussion of the general principles of the entrapment defense and the crime of conspiracy,48 the court stated that "[t]he only substantive issue presented in this appeal is whether the district court erred in rejecting Canaday's entrapment defense."49

Since the district court did not clearly indicate why Canaday's entrapment defense was rejected,50 the Nebraska Supreme Court had to determine whether the rejection resulted from one of two alternative possibilities. The district court must have decided either that (1) there was an absence of inducement by the government or (2) if there was inducement, Canaday was predisposed to commit the crime.51 After stating that "[i]nducement consists of an opportunity plus something else,"52 the court stated that "something else" can include things such as "excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive . . . ."53 The court determined that inducement occurred because "the government materially affected the normal balance between risks and rewards" when it made the initial references

42. See id.
43. See id. at 578, 641 N.W.2d at 23.
44. Id.
45. See id.
46. Id.
48. See id. at 580-81, 641 N.W.2d at 25 (explaining the unilateral approach to the agreement element of conspiracy requires only that the defendant agree with another person, even if the person is an agent who is feigning agreement). The unilateral approach is clearly necessary in cases like Canaday, where undercover operations require an agent to pose as a co-conspirator.
49. Id. at 581, 641 N.W.2d at 25.
50. See id. at 582, 641 N.W.2d at 26.
51. See id.
52. Id. at 583, 641 N.W.2d at 26.
53. Id. at 585, 641 N.W.2d at 28.
to children and continued correspondence from Lisa that "played on his emotions and desires" to continue his relationship with her.\textsuperscript{54}

Following the determination that Canaday was induced, the Nebraska Supreme Court then determined that there was not enough evidence to conclude that Canaday was predisposed to commit the crime charged.\textsuperscript{55} The court stated that in order to determine that a defendant was predisposed, the evidence of predisposition must be independent and not a product of the inducement by the government.\textsuperscript{56} Upon reversal, the court rejected the State's argument that predisposition was demonstrated by the mere fact that Canaday responded to the advertisement placed by the police department and focused instead on the fact that Canaday's original letter and a search of his home revealed no evidence suggesting he had any interest in sex with children.\textsuperscript{57}

\textbf{B. The Defense – Entrapment Generally}

Entrapment is an affirmative defense\textsuperscript{58} that developed to protect those individuals who would likely not have committed a crime had the government or law enforcement not designed and executed a plan which unrealistically disrupted the normal course of their lives and provided opportunities that otherwise would not have been encountered.\textsuperscript{59} Since the entrapment defense is a judicially and not constitutionally created defense,\textsuperscript{60} each court is free to establish its own version of the defense and can adopt its own set of standards.\textsuperscript{61} Left with this freedom, the defense has come to take on two different forms that differ slightly with respect to the test employed by the courts in determining whether the defense is proper.\textsuperscript{62} The test adopted by the

\begin{itemize}
\item \textsuperscript{54} Id.
\item \textsuperscript{55} See id. at 589, 641 N.W.2d at 30.
\item \textsuperscript{56} See id. at 585, 641 N.W.2d at 28.
\item \textsuperscript{57} See id. at 588-589, 641 N.W.2d at 30.
\item \textsuperscript{58} See Matthews v. United States, 485 U.S. 58, 63 (1988) (explaining that the entrapment defense is an affirmative defense because it would be "inconsistent" for a defendant to challenge the elements of the crime committed, but claim at the same time that he was entrapped into committing the crime); 21 AmJUR 2D, Criminal Law § 203 (1981) (characterizing the entrapment defense as an affirmative defense).
\item \textsuperscript{59} "[T]he entrapment defense is the judicial instrument created to address [the] possibility of government-manufactured crime." Dies, supra note 5, at 1207.
\item \textsuperscript{60} See 21 AmJUR 2D, Criminal Law § 203 (1981) (stating that entrapment was not developed through constitutional means, yet it has been "universally accepted" by judicial decision or legislation in the states).
\item \textsuperscript{61} See id. (pointing out that Congress can address entrapment for purposes of federal law, and state courts are "free to select [their] own standards for the defense").
\item \textsuperscript{62} See generally 21 AmJUR 2D, Criminal Law §§ 205, 206 (1981) (explaining and comparing the subjective and objective tests, respectively).
\end{itemize}
majority of state courts and the majority of the justices on the Supreme Court of the United States has been termed the “subjective” or the “origin of intent” test while a minority of the state courts and a minority of the Supreme Court justices prefer the “objective” test. Since Nebraska has adopted the majority test, the subjective or “origin of intent” test, this Note will focus on entrapment as it is characterized by this test.

C. Predispositional Element – The Ultimate Focus

Under the subjective test, a successful entrapment defense consists of two related, yet distinct elements: (1) inducement by the government to commit the crime charged and (2) a lack of predisposition on the part of the charged defendant. When the subjective test of entrapment is employed, the burden of proof shifts away from the defendant as soon as he produces only a little more than a “mere scintilla” of evidence to demonstrate government inducement. If the defendant is successful in proving inducement, the burden shifts to the prosecution and it must prove beyond a reasonable doubt the defendant was predisposed. Due to the relative ease with which a defendant can establish the element of inducement, when the entrapment defense is asserted the focus is almost exclusively on the element of predisposition.

With respect to undercover government operations, the Supreme Court has pointed out that “[t]he appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design . . . the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law.” This language is important because it makes clear the Supreme Court’s desire to ensure that when government operations are executed, only those individuals who would have violated the law absent any government inducement, in other words, those who were predisposed, are ensnared in the net of inducement.

63. 21 AMJur 2d, Criminal Law § 205 (1981) (calling the subjective test the “generally accepted” test); see also Deis, supra note 5 (pointing out that the preferred test is the subjective test).
67. See id. (explaining the shifting burden).
68. See supra notes 7-9 and accompanying text.
69. Sorrells, 287 U.S. at 441-42 (emphasis added).
D. The Problem of Assessing Predisposition – Recognition by the Courts

It may seem logical to assert that government operations should focus only on predisposed individuals and not those who succumb to levels and types of inducement they would be unlikely to encounter during their lifetime absent any fabricated situation. Yet, once a crime has been committed and an individual has been accused, it is difficult to deny that any attempt to assess the disposition of the accused prior to the government inducement has a high risk of being tainted by the existence of the charges asserted against him or her.

Traditionally, the prosecution has focused on evidence regarding the mental state of the defendant to demonstrate the requisite predisposition. However, recent cases recognize the problem of pre-inducement evidence being tainted by post-inducement accusations. The concept of positional predisposition, explained most explicitly in United States v. Hollingsworth, would require the prosecution's predisposition case to include not only an examination of evidence regarding the mental state of the accused, but also an examination of evidence regarding the resources available to the accused prior to the government involvement.

Since states are free to adopt their own versions of the entrapment defense, the treatment of what constitutes sufficient predisposition such that it will strip the defendant of the protection provided by the entrapment defense varies across different jurisdictions. This section focuses on the different ways the element of predisposition has been treated by the United States Supreme Court and the Eighth Circuit Court of Appeals. The views of these jurisdictions are the most relevant here not only because Canaday looked primarily to the United States Supreme Court for guidance in its assessment of predisposition, but also because of the power of precedent that these jurisdictions exert over the Nebraska Supreme Court.

70. Until recently, most cases have suggested that the prosecution needs only to demonstrate that the defendant was "psychologically prepared" to meet their burden. United States v. Hollingsworth, 27 F.3d 1196, 1198 (7th Cir. 1994).
72. 27 F.3d 1196 (7th Cir. 1994).
73. See Hollingsworth, 27 F.3d at 1200 (stating that "predisposition is not a purely mental state," and that the prosecution's burden under the positional predisposition concept requires a showing that the defendant was "so situated by reason of previous training or experience or occupation or acquaintances" that he would have had the ability and resources to commit the crime absent government involvement).
74. See supra notes 59-61 and accompanying text.
75. Although the Canaday opinion cites to several cases throughout, it primarily focuses on Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535 (1992), when
In the following cases, the court overturned a conviction after determining that the prosecution did not sufficiently carry its burden of proving predisposition. The opinions from these decisions reveal that the courts are not willing to allow the entrapment defense to fail if the evidence of predisposition is based solely on the mental state of the defendant. Almost invariably, the focus of the court's decision to overturn is on the lack of evidence suggesting that, prior to government involvement, the defendant possessed the resources required to commit the crime.

1. United States Supreme Court

In Sorrells v. United States, the Supreme Court reversed a conviction of a defendant who was charged with possession of intoxicating liquor following a transaction involving an undercover government agent. Prior to reaching the Supreme Court, the defendant's attempted assertion of the entrapment defense was rejected by the trial court, a ruling that was upheld by the Ninth Circuit Court of Appeals. Upon reversal, the Supreme Court stated that because the government failed to effectively present evidence suggesting that the defendant had "ever possessed or sold any intoxicating liquor prior to the transaction in question," the entrapment defense was available to the defendant and refusal of the lower court to submit the issue of entrapment to the jury constituted reversible error.

Following Sorrells, the Supreme Court heard the case of Sherman v. United States, where the Court again reversed a conviction in which the lower court rejected the defendant's attempted assertion of the entrapment defense. The Sherman opinion revealed that the Court had become concerned with drawing a line between "the trap for the unwary innocent and the trap for the unwary criminal." The Court refused to side with the government's position that two prior convictions for similar crimes were sufficient to demonstrate predisposition.

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77. See this section and the reasons stated for overturning convictions (addressed individually by case).
78. 287 U.S. 435 (1932).
79. See id. at 438.
80. See id.
81. See id. at 441.
82. See id. at 452.
84. See id. at 369.
85. See id. at 372.
sition.86 Apparently, the Court felt that evidence of previous convictions is not necessarily enough to say that the defendant has fallen in the category of the "unwary criminal."87

In Jacobson v. United States,88 a recent Supreme Court case that originated in Nebraska, the Court addressed the predisposition element of the entrapment defense and once again reversed a defendant's conviction after reasoning that the defendant should have been allowed to assert the entrapment defense.89 The defendant in this case was charged with receiving child pornography following two and one-half years of government inducement.90 The Supreme Court reversed the lower court, placing importance on the fact that the defendant did not himself initiate any correspondence and that prior to the government operation there was no evidence that the defendant had ever possessed or expressed an interest in child pornography.91 Jacobson was heavily relied upon in Canaday with respect to the element of predisposition.92

In the earlier cases of Sorrells and Sherman, the Court demonstrated that, although historically the "critical component" of the predispositional element had been the assessment of the defendant's state of mind,93 the Court was not willing to allow the government to prevail in a case based purely on evidence of past behavior or a showing of mental preparedness.94 Subsequently, the Court made it clear in Jacobson that the government will not prevail in their attempt to establish predisposition absent a showing that prior to any government contact the defendant possessed at least some of the physical materials and resources needed to commit the crime.

With respect to exactly what kind of evidence is sufficient to defeat the entrapment defense, the Supreme Court expressly held that more is required than mere submission to persistent government induce-

86. Specifically, the Court stated that "a nine-year-old sales conviction and a five-year-old sales conviction are insufficient" to show a "readiness" to sell drugs at the time the agent approached him. Id. at 375.
87. Id. at 372.
89. See id. at 542.
90. See id. at 543.
91. See id. at 546-47.
92. See State v. Canaday, 263 Neb. 566, 641 N.W.2d 13 (2002) (citing to Jacobson repeatedly in the section addressing the element of predisposition). In addition to relying on Jacobson with respect to the predisposition issue, Canaday also cites to Jacobson for general statements regarding the purpose of the entrapment defense. For example, in the conclusion of the Canaday opinion, the court cites to a portion of Jacobson that quotes Sherman and states: "The defense of entrapment serves to prevent law enforcement agencies from overstepping the line between setting a trap for the "unwary innocent" and the "unwary criminal."" Id. at 589, 641 N.W.2d at 30.
93. See McLoughlin, supra note 1, at 1072 (1999).
94. See supra notes 82, 83, 87, 88, and accompanying text.
ment,95 or evidence of a few prior convictions for similar crimes.96 Additionally, the Court emphasized the importance of focusing on the disposition of the defendant prior to any contact by government officials.97 This seems to imply that any evidence gathered after the contact has occurred will be more susceptible to a claim by the defense that the evidence is not necessarily suggestive of predisposition. Indeed, a trace through the opinions reveals the Court is unwilling to reject the entrapment defense when the prosecution fails to show that the defendant possessed the resources required to commit the crime charged prior to the government involvement.98

2. Eighth Circuit Court of Appeals: United States v. Jacobson

The Eighth Circuit decision to convict the defendant in United States v. Jacobson,99 was overturned by the Supreme Court.100 Since the Supreme Court overturned the Eighth Circuit decision in Jacobson based primarily on a determination that there was insufficient evidence of predisposition,101 it may lead one to believe that the Eighth Circuit holds a view of the predisposition element that is markedly different from that of the Supreme Court. However, an early Eighth Circuit opinion reveals that this jurisdiction does not necessarily hold a view so different from that of the Supreme Court. In Butts v. United States,102 the Eighth Circuit refused to uphold a conviction after determining the prosecution did not present sufficient evidence of predisposition. The Court stated that

when the accused has never committed such an offense as that charged against him . . . and never conceived any intention of committing the offense

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95. Upon reversal of the Eighth Circuit decision in Jacobson, the Supreme Court stated:

Had the agents in this case simply offered [the defendant] the opportunity to order child pornography through the mails, and [the defendant] . . . had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. But that is not what happened here. By the time [the defendant] finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Jacobson v. United States, 503 U.S. 540, 550 (1992).


97. See, e.g., Jacobson v. United States, 503 U.S. 540, 549 (1992) (emphasizing that "the sole issue is whether the Government carried its burden of proving that petitioner was predisposed to violate the law before the Government intervened) (emphasis in original).

98. In both opinions, the Court placed importance on the fact that searches of the homes of the defendants revealed no materials (intoxicating liquor in Sorrells, child pornography magazines in Jacobson) needed to commit the crimes charged.

99. 916 F.2d 467 (8th Cir. 1990).

100. Jacobson, 503 U.S. at 542 (tracing the procedural history of Jacobson).

101. See supra note 92 and accompanying text.

102. 273 F. 35 (8th Cir. 1921).
prosecuted ... and had not the means to do so, the fact that the officers of the
government incited ... him to commit the offense charged ... is and ought to
be fatal to the prosecution.103

Although it remains to be seen whether the Eighth Circuit will pay
heed to the Supreme Court's disfavor of its treatment of the predispo-
sition element in the Jacobson opinion, the language of the more re-
cent Eighth Circuit opinions reveal that the Eight Circuit might be
more receptive to the prosecution's case if they can present evidence
that the accused possessed the resources required to commit the crime
prior to the government involvement.104 In addition, other jurisdic-
tions, including the Seventh and Ninth Circuits, have also recognized
the problem of post-accusation assessments of predisposition.105 The
view taken by these courts is addressed in the analysis section of this
Note.

E. Jacobson as Signaling a Shift – Introducing a
Requirement of Positional Predisposition

The Jacobson opinion was the first time the Court explicitly stated
that in order for the prosecution to meet their burden of demonstrat-
ing predisposition, it must prove disposition “prior to first being ap-
proached by Government agents.”106 Although this “prior to”
requirement may appear to be no more than an articulated statement
of what both Sorrells and Sherman determined implicitly, in her dis-
sent, Justice O'Connor stated: “I believe the Court ... redefines ‘pre-
disposition,’ and introduces a new requirement that Government sting
operations have a reasonable suspicion of illegal activity before con-
tacting a suspect.”107 This approach, requiring that the prosecution
demonstrate the defendant was in a position to commit the crime, has
been termed “positional predisposition.”108

Although the Jacobson opinion does not purport to explicitly adopt
any significant shift in the treatment of the entrapment defense, other
courts and scholars analyzing the opinion have agreed with Justice
O'Connor in her view that Jacobson did indeed signal a change in how
the element of predisposition should be defined and demonstrated.109

103. Id. at 38 (emphasis added).
104. See, e.g., United States v. Brooks, 215 F.3d 842 (8th Cir. 2000) (requiring that
consideration of predisposition include an examination of the defendant's per-
sonal background, and refusing to determine that evidence of prior convictions
alone were sufficient to demonstrate predisposition).
105. See United States v. Poshlman, 217 F.3d 692 (9th Cir. 2000); United States v.
Hollingsworth, 27 F.3d 1196 (7th Cir. 1994).
107. Id. at 556 (O'Connor, J., dissenting).
108. See McLoughlin, supra note 1, at 1073.
109. In a lengthy assessment of the Jacobson decision, Judge Posner, a Seventh Cir-
cuit Court of Appeals Judge, pointed out that “it is not unusual for a court to
According to one assessment of the *Jacobson* opinion, it was said that it should be viewed as actually "demand[ing]" a positional predisposition requirement.\(^1\)

Traditionally, the prosecution has been able to defeat an assertion of the entrapment defense by demonstrating that the defendant possessed a mental state suggesting predisposition to commit the crime.\(^1\) Specifically, *Jacobson* has been interpreted as requiring the prosecution to demonstrate that, in addition to a mental state suggesting a predisposition, a successful demonstration of predisposition must include a showing that the defendant also had access to the resources that were required to commit the crime charged prior to the government involvement.\(^1\) Ultimately, it appears that the [Supreme] Court clarified the meaning of predisposition. Predisposition is not a purely mental state . . . . It has positional as well as dispositional force. . . . The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime [someone else would have done so].\(^1\)

The analyses characterizing *Jacobson* as signaling a shift toward requiring positional predisposition are important in assessing the position of the Nebraska Supreme Court. This is true not only because the Supreme Court essentially told the Nebraska Supreme Court that its treatment of the entrapment defense in *Jacobson* constituted reversible error,\(^1\) but also because the *Canaday* decision uses the Supreme Court opinion from *Jacobson* to explain its treatment of the defense.\(^1\)

III. ANALYSIS

Although *Canaday*, like *Jacobson*, does not expressly claim to constitute any significant shift in the way the entrapment defense is change the law without emphasizing its departures from or reinterpretation of precedent," and that *Jacobson* did indeed signal a shift. United States v. Hollingsworth, 27 F.3d at 1198.


11. With respect to the direction toward which courts were drifting prior to the *Jacobson* decision, it had been said that "the defense of entrapment must fail in any case in which the defendant is 'willing,' in the sense of being psychologically prepared." Hollingsworth, 27 F.3d at 1198.

12. Hollingsworth points out that if the *Jacobson* court had agreed with precedent (that a mental state was all that was required to demonstrate predisposition), then the Supreme Court would have upheld the conviction. Id. at 1199.

13. Id. at 1200.

14. The Supreme Court decision overturning Jacobson's conviction meant that both the United States District Court's initial conviction and the Eighth Circuit's decision to affirm, see *Jacobson*, 503 U.S. 540, 542 (tracing the procedural history of *Jacobson*), constituted reversible error.

treated in Nebraska, an examination of opinions from other jurisdictions reveals that Canaday may constitute a movement toward the path taken by the Supreme Court in requiring the prosecution's burden to include a demonstration of positional predisposition. If Canaday indeed signals a shift in the way the Nebraska Supreme Court will treat the prosecution's burden in cases where the entrapment defense is raised, the court should take its first opportunity to make this requirement explicit. Although making the requirement of positional predisposition explicit might appear to constitute a significant change, the move would not be unsupported or entirely unprecedented.116

It appears that in order to comport with public policy and the standards for law enforcement,117 and in an attempt to avoid the stigma that attaches to individuals accused of a crime regardless of whether the accusation results in conviction,118 at least two related shifts in the process of identifying and prosecuting targets of government operations have gained recognition by the courts. The primary shift is the move toward making positional predisposition a required part of the prosecution's burden when the defense of entrapment is asserted. The related shift is a movement toward ensuring that undercover operations are more carefully designed to target a more identifiable target group. The Canaday opinion signals that the Nebraska Supreme Court is beginning to recognize the need for these shifts as well and is taking the necessary steps to ensure that these shifts are put in motion.

116. Although making the positional predisposition requirement explicit may appear to constitute an even larger change than Canaday, if the suggestion that Canaday constitutes a shift is correct, then explicitly requiring positional predisposition only takes the step of making clear what was implicitly required anyway. Making the requirement explicit would not be entirely unprecedented, as Judge Posner of the Seventh Circuit has already asserted that he believes positional predisposition is required in the wake of Jacobson. See McLoughlin, supra note 1, at 1073-74. Consequently, it would seem the Seventh Circuit would require a showing of positional predisposition in the future, and would likely do so expressly.

117. In Butts v. United States, 273 F. 35 (8th Cir. 1921), the court identified the underlying principles of law enforcement by stating:

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

Id. at 38.

118. See Jon R. Waltz & Roger C. Park, Evidence Cases and Materials 384 (9th ed. 1999) (stating that “[e]ven to be acquitted may damage one’s good name if the community . . . chooses to remember the defendant as one who ought to have been convicted”).
A. Requirement of Positional Predisposition

If a person targeted and charged following a government operation has asserted the entrapment defense, the courts have recognized the importance of demanding that the prosecution demonstrate the defendant possessed the resources required to commit the crime charged.119 An explicit requirement of positional predisposition would demand that the prosecution demonstrate that, prior to the government inducement, 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 him to commit the crime some criminal would have done so."120 Although it is not uniformly adopted, some courts do take the view that the prosecution must demonstrate positional predisposition in order to effectively dismantle an assertion of the entrapment defense.121

In the Seventh Circuit Hollingsworth opinion, Judge Posner first pointed out that Jacobson constituted a shift toward a requirement of predisposition.122 Next, the Hollingsworth court followed what it believed the Jacobson court implicitly required and refused to uphold the conviction of a defendant where the prosecution was unable to demonstrate that the defendant possessed the requisite materials or contacts to commit the crime charged.123 This decision demonstrates that the Seventh Circuit is willing to add a requirement of positional predisposition to the burden of the prosecution.

In United States v. Poehlman,124 the Ninth Circuit Court addressed a case with facts nearly identical to those in Canaday.125 The Poehlman opinion is especially relevant here due to the fact the Nebraska Supreme Court uses the Ninth Circuit position in Poehlman to guide its own treatment of the entrapment defense.126

119. See supra section II.D.
120. United States v. Hollingsworth, 27 F.2d 1196, 1200 (7th Cir. 1994).
121. See McLoughlin, supra note 1, at 1073 (stating that the 7th Circuit has taken this view).
122. See supra notes 112-13 and accompanying text.
123. See Hollingsworth, 27 F.3d 1196 (7th Cir. 1994).
124. 217 F.3d 692 (9th Cir. 2000).
125. The defendant in Poehlman was convicted by the trial court of crossing state lines for the purpose of engaging in sex acts with a minor. The defendant had responded to an ad placed by the government indicating that "Sharon" was looking for "someone who understood her family's 'unique needs.'" Id. at 695. In subsequent correspondence, Sharon referred to wanting a "special man teacher" for her "sweethearts" and, as in Canaday, the defendant responded with uncertainty about what Sharon meant. Id. at 696. However, "Poehlman finally got the hint" and was eventually arrested upon arriving at a hotel to meet Sharon. Id. at 697.
126. After analogizing the facts of Canaday to the facts of Poehlman, see supra note 126, the Nebraska Supreme Court continued to look to Poehlman as it analyzed the entrapment defense. See State v. Canaday, 263 Neb. 566, 584-86, 641 N.W.2d 13, 27-29 (2002).
The Ninth Circuit opinion stated that "the relevant time frame for assessing a defendant’s disposition comes before he has any contact with government agents, which is doubtless why it’s called predisposition." This language demonstrates that the Ninth Circuit is recognizing the inescapable problem presented by attempting to assess a state of mind that is no longer present due to the events that occurred between the time of interest and the time of assessment. Additionally, the Poehlman opinion demonstrates that evidence of predisposition which carries a risk of being tainted by the accusation will be closely scrutinized. With respect to statements made by the defendant, the court made it clear that any statements made after inducement will rarely constitute evidence sufficient to demonstrate predisposition due to the possibility these statements may be tainted by the inducement.

Upon reversal, the court stated that the record was "sparse" with respect to evidence regarding any behavior or conduct prior to government contact that would suggest a predisposition to commit the crime charged. The Ninth Circuit, like the United States Supreme Court, reveals a desire to place importance on the "pre" in predisposition when looking at evidence submitted with the intent of demonstrating the presence of predisposition.

Prior to the decision in Canaday, the Nebraska Supreme Court held in State v. Heitman that the defendant was guilty of criminal conspiracy to commit first degree sexual assault on a child after a determination that the government presented enough evidence to demonstrate predisposition. Unlike Canaday, the defendant in Heitman did initiate contact with a minor and did so prior to any contact from the government. Only after the minor alerted her employer that the contact had occurred did the police become involved.

Heitman alone is not sufficient to demonstrate that the Nebraska Supreme Court is looking toward any positional predisposition requirement because when a defendant initiates contact prior to any government involvement, there is not much of a positional predisposition.

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127. Poehlman, 217 F.3d at 703 (emphasis in original).
128. Although this claim that the language demonstrates recognition of these problems may seem a bit of an attenuated assumption at first, the effect of the language becomes more clear when considering that if the relevant time frame for assessing disposition comes before inducement (the time of interest), then the relevant time frame is not after inducement (the time of assessment).
129. See Poehlman, 217 F.3d at 704-05.
130. See id. at 703-04.
131. See supra text accompanying note 94.
132. 262 Neb. 185, 629 N.W.2d 542 (2001).
133. See id. at 187, 629 N.W.2d at 546.
134. Heitman gave a minor drive-through employee a sexually suggestive letter in an envelope which also contained a condom. Id. at 187-88, 629 N.W.2d at 546-47.
135. See id.
tion question. The comparison between Heitman and Canaday without more is not particularly helpful because it is unlikely that all future cases will include facts which fall neatly into the “predisposition absent” category demonstrated by Canaday (no initiation by defendant, repeated and consistent inducement by government) or the “predisposition present” category demonstrated by Heitman (defendant initiated contact, government steps in later). However, when taking the Heitman distinction into account in combination with Canaday’s reliance on Poehlman, it provides strong support for the suggestion that the Nebraska Supreme Court is following the Seventh and Ninth Circuits not only in recognizing the risks presented by post-accusation assessments of predisposition, but in adopting the view that requiring the prosecution to demonstrate positional predisposition is one way to limit these risks.

If the Nebraska Supreme Court has indeed adopted a positional predisposition requirement, it would suggest that had the Omaha Police Department presented any evidence to the court suggesting that even without government involvement Canaday would likely have encountered similar levels of suggestion and persuasion and would likely have acted upon it, then the question of whether he was predisposed to commit the crime would not have been an issue of such focus. If this type of evidence was presented, Canaday would have been more similar to Heitman and would not have generated such controversy over whether or not the element of predisposition was demonstrated.

B. Identification of Target(s) Prior to Executing Undercover Operations

The second shift recognizes that in designing an undercover operation, identification of the target(s) must involve some sort of narrowing process. Although this shift was not expressly addressed in Canaday, the shift toward requiring positional predisposition provides an implicit warning to those designing undercover operations that they must take precaution in the planning stages to ensure that the operations target only those truly predisposed. Any design process that allows the government operation to send out a lure that has a large and unidentifiable target group is too broad. The government inducement must involve bait that is specifically designed to identify

136. Following Canaday, it is unlikely that there would be any question of predisposition if, as in Heitman, the government does not even become involved until after the defendant has already demonstrated he has the resources and mental state required to commit the crime charged.

137. Canaday himself responded to an advertisement that was “vague and open to interpretation” under a heading of “women seeking men,” which was placed in a magazine with sexual content aimed at adults. State v. Canaday, 263 Neb. 566, 641 N.W.2d 13, 17 (2002).
those who would actually commit a crime, not those who would only turn a head.

Canaday illustrates the importance of ensuring that when an operation is specifically designed to identify those persons with a predisposition to commit a specific crime, the law makes certain that the bait used is not vague and generic, but clearly designed to lure and capture the target.¹³⁸ If a mere nibble reveals so little about a person's disposition with respect to the nature of the crime that it becomes impossible to tell for certain whether that person would have committed the crime in a non-manufactured setting, the bait is not properly designed. By way of analogy, when a lure is tied onto a line and thrown into a school of various species of fish, it is important for a Walleye fisherman to know in advance that his lure is designed specifically to catch the Walleyes. The lure must be realistic and should not have such large hooks that it catches a fish only swimming by to view the attractive colors. A true fisherman would not count a hook in the side as a catch, and would throw back a Perch who mistook the Walleye bait for something the Perch would have found more appetizing. The law should do the same when it comes to designing undercover sting operations.

In Canaday, the Nebraska Supreme Court appears to recognize the importance of narrowing the group of persons who might ultimately become caught in the trap set by the government.¹³⁹ If, as the State contended in Canaday, simply responding to a vague¹⁴⁰ advertisement that a reasonable man could interpret as a legitimate means to meet a single adult woman constitutes a predisposition to sexual assault on a child, the element of predisposition is so simple to demonstrate that a successful assertion of the defense becomes virtually impossible.

Canaday himself responded to an advertisement that was “very vague and open to different interpretations” under a heading of “women seeking men,” which was placed in a magazine with sexual content aimed at adults.¹⁴¹ Despite the possibility that someone responding to this ad could have had the very legal purpose of meeting an adult woman, Canaday’s response to this advertisement is what

¹³⁸. The Canaday opinion continually draws attention to Canaday’s confusion regarding the true desires of Lisa. See, e.g., supra note 27 and accompanying text. The witness testimony was apparently “very vague and open to different interpretations.” Canaday, 263 Neb. at 588, 641 N.W.2d at 30. The opinion’s focus on Canaday’s confusion suggests that had the prosecution offered better evidence to show that the operation was very carefully and specifically designed to target individuals with an interest in sex with young children, the court may have been more receptive to the prosecution’s position.

¹³⁹. See supra note 138.

¹⁴⁰. See Canaday, 263 Neb. at 568-569, 641 N.W.2d at 17.

¹⁴¹. Canaday, 263 Neb. at 568-69, 641 N.W.2d at 17.
made him a target and provided the lines of communication, which ultimately led to the accusations against him. This advertisement throws out a lure that is too vague, and a net that is too big. The operation used contained too few safeguards to ensure that the net has holes large enough for those who are not sufficiently disposed to slip out before the net is pulled in. Canaday was a single man who was hungry for companionship and was attracted by the language of the advertisement. It is impossible to tell whether the mention of children or the mention of a single woman sparked Canaday's interest, but from the evidence and testimony available, it seems at least as likely that Canaday's interest was in Lisa, not the children. If Canaday would have independently suggested and unquestionably interpreted the "special education" as involving sex with children within the first few communications with Lisa, it would be far less likely that the only intention of Canaday's initial response was an adult relationship.

Although the advertisement Canaday responded to was developed as part of an operation designed to lure those persons with a sexual interest in children, the language of the advertisement was open to so many different interpretations that it seems more likely that the interpretation of any one person would not involve any expectation or understanding that sexual relations with children were being insinuated. Despite Officer Henthorn's testimony that the letter written to Canaday following Canaday's initial response was worded specifically to reach those with an interest in children, it seems that this testimony is contradictory in light of the fact that Henthorn also testified that the original advertisement that Canaday responded to was "vague and open to different interpretations."142

It seems inconsistent and contrary to the purpose of law enforce-

\[142. \text{Id. at 588, 641 N.W.2d at 30.} \]

\[143. \text{See supra note 117.} \]
NEBRASKA'S ENTRAPMENT DEFENSE

C. Assessing the Impact of the Shift Toward Positional Predisposition as a Requirement: Advantages and Disadvantages

There are advantages and disadvantages to this shift in the treatment of the predisposition element. A requirement that the element of predisposition includes a showing of positional predisposition has advantages relating to both problems discussed above with respect to the Canaday case.

First, making positional predisposition an explicit demand on the prosecution will provide the government with a warning regarding the design of their operations. Requiring a demonstration of positional predisposition most directly affects the prosecution in that their burden becomes more difficult to meet. However, without this warning, there will likely be a mismatch between those who are caught in the operation and those who are actually found guilty of the crime charged. Accusing people who are eventually determined not guilty will most definitely have an undesirable effect upon the reputation of both law enforcement and the criminal justice system. If the government does not sufficiently identify the targeted individual or groups and properly design the operation accordingly, it becomes possible they will accuse someone who will have a good chance of asserting the entrapment defense. However, if the government knows in advance that the trial may require proof of positional predisposition, it will encourage more careful design in attempt to target only those who will later be unable to demonstrate they are lacking the means needed to commit the crime charged.

A second advantage is closely related to the first. Assuming the requirement of positional predisposition does encourage the government to more carefully design their operations to target only those who will be unable to successfully assert the entrapment defense.

144. Because the traditional treatment of the entrapment defense only required the prosecution show evidence showing mental preparedness, see supra notes 70, 111, and accompanying text, requiring the prosecution to demonstrate positional predisposition makes this burden more difficult to meet in that it additionally requires a showing that the defendant possessed the resources necessary to commit the crime. See supra notes 108, 113, and accompanying text.

145. It seems unlikely anyone would deny that false accusations are looked upon unfavorably. Additionally, the principles underlying law enforcement generally, see supra note 117, would not be furthered by a record revealing multiple occasions of false accusations.

146. See McLoughlin, supra note 1, at 1083 (addressing the arguments in favor of positional predisposition and stating that “a positional predisposition rule returns entrapment analysis to its roots by limiting the arrest and punishment of non-dangerous individuals”).

147. See supra note 138 and accompanying text.
This should minimize the risk of individuals being unjustly stigmatized by accusations that do not result in convictions.

A possible disadvantage to consider is the likelihood that the government and the police force will resist positional predisposition becoming a required part of the prosecution's case. Narrowing the design before executing an operation and requiring more evidence to be presented will result in an increased burden on whoever is designing and executing the operation. Additionally, it is possible that the evidence of positional predisposition could be difficult for the prosecution to obtain. This is especially true in a case of a drug charge where the drugs could easily be disposed of prior to a search.

Despite the possible disadvantages, it seems that they are easily overcome and are outweighed by the potential advantages. Eventually, the process of more careful design and gathering of evidence will not be as difficult because of experience. Also, if the expected advantages are obtained, then the law enforcement system will gain more credibility due to an increased accusation-conviction ratio and a decreased fear of being unfairly accused.

IV. CONCLUSION

It appears that the Nebraska Supreme Court has joined other jurisdictions in recognizing the advantages to be gained from a shift toward making positional predisposition a required part of the prosecution's burden. Canaday did not make positional predisposition an explicit requirement, but it undoubtedly has sent a warning to those who execute undercover operations. The warning is sent in the form of the court making it clear that there will be no conviction in a case where the prosecution is unable to demonstrate the person who was charged as a result of the operation possessed the requisite materials and resources required to commit the crime.

Although Canaday stopped short of explicitly requiring positional predisposition, it would not require a stretch to assume that the large group of scholars and cases asserting that Jacobson constitutes a shift in the way the Supreme Court of the United States treats the element of predisposition, would also conclude that Canaday constitutes a shift in the way that the Nebraska Supreme Court treats the element of predisposition. If these scholars and courts are correct in their assertions, the Nebraska Supreme Court is moving toward requiring positional predisposition. In light of the advantages the positional predisposition requirement would have, the court should make this requirement explicit at its first opportunity. An explicit predisposition requirement should have significant effects not only on the manner in which the prosecution structures its case against a defendant who asserts the entrapment defense, but also on the way that law enforcement designs its undercover operations.