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Elizabeth D. Tempio

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2007]

A/S/L?1 45/J O H N D O E OFFENDER/FEDERAL PRISON—THE
THIRD CIRCUIT TAKES A HARD LINE AGAINST CHILD
PREDATORS IN UNITED STATES v. T YK A R S K Y

"[T]he very nature of the Internet provides an 'ominous method' for anon-
ymous predatory criminal conduct."2

I. Introduction

Thanks in part to the popular “Dateline NBC” series, “To Catch a
Predator,”3 Internet sting operations are now familiar to many Americans:
a decoy poses as an underage child4 and forms an on-line relationship

1. See Nat’l Cr. for Missing & Exploited Children, Help Delete Online
linelingo.pdf (last visited Sept. 27, 2007) [hereinafter A/S/L] as online acronym utilized to determine recipient’s age, sex, and location); see also Michael W. Sheetze, Cyberpredators: Police Internet Investigations Under Florida
first question asked by predators to potential victims).

United States v. Dotson, 324 F.3d 256, 260 (4th Cir. 2003)), vacated, 543 U.S. 1102
(2005).

3. See Press Release, MSNBC, “To Catch a Predator” Returns Tuesday, Jan. 30,
Press Release] (detailing nature and objective of “To Catch a Predator” series). In
the Dateline NBC series “To Catch a Predator,” host Chris Hansen travels from
coast-to-coast conducting investigations in which he confronts men who allegedly
use the Internet to solicit sex from minors. See id. (describing concept of show); see
also Alessandra Stanley, The TV Watch: Gotcha! A Walk of Shame for Online Predators,
N.Y. TIMES, May 17, 2006, at E1 (describing nature and objective of “Dateline
NBC” series). Stanley explains that:

"Dateline" works with a civilian watchdog group and local law enforce-
ment to unmask would-be pedophiles using Internet sting operations. An
adult poses as a teenage boy or girl online and invites a predator for a
tryst. The suspect finds himself in a cozy suburban kitchen filled with
snacks, only to discover the “Dateline” correspondent Chris Hansen and
hidden cameras lying in wait.

. . . . The suspects are seemingly ordinary men, many married with chil-
dren, many middle-aged and portly.

Id.

4. See Kimberly Wingteung Seto, Note, How Should Legislation Deal With Chil-
dren as the Victims and Perpetrators of Cyberstalking?, 9 CARDozo WOMEN’S L.J. 67, 75
n.82 (2002) (citing Ashley A. Halfman, Note, Giving Offenders What They Deserve:
Amendments to Federal Sentencing Guidelines Section 2G2.2, Addressing Child Pornography
Distribution, 36 GA. L. REV. 219, 225 (2001) (defining "child"). For the purposes
of this Casebrief, a "child" is “one who ‘[h]as not reached the age of consent.’” See
id. (same); see also 18 U.S.C. § 2422(b) (Supp. IV 2004) (establishing liability for
offenses against "any individual who has not attained the age of 18 years").

(1071)
with an adult through Internet chat rooms,\(^5\) Instant Messenger\(^6\) conversations and emails.\(^7\) If the adult is undeterred after learning of the child’s young age, the relationship continues, with the conversations becoming increasingly sexually explicit.\(^8\) The decoy ultimately consents to meet the adult, but when the adult arrives at the agreed-upon location, expecting to

5. See Australian Government: NetAlert, Australia’s Internet Safety Advisory Board, http://www.netalert.gov.au/advice/services/chat/what_is_a_chat_room.html (last visited Sept. 27, 2007) (defining “chat room”). For the purposes of this Casebrief, an Internet “chat room” is:
   [A] place on the Internet where people with similar interests can meet and communicate together by typing messages on their computer. . . . Messages that are typed in by a user appear instantly to everybody who is in that chat room. . . . People can enter a chat room without any verification of who they are.

Id.

   [A program] that can instantly send messages from one computer to another. They are a form of ‘instant e-mail’ and are very popular with both children and adults. . . . Instant messaging programs are usually a one-to-one communications medium, although some programs allow many people to chat to each other at the same time, much like a private chat room.

Id.

   [A] shortened version of the two words ‘electronic’ and ‘mail’ and can be considered the electronic version of the letter. . . . Email enables messages to be transferred from an individual to another individual or from an individual to a group of people. Documents (audio, video, pictures etc.) can be attached to email messages and sent with the message. . . . Email can be sent to anywhere in the world and viewed whenever the recipient logs onto the Internet and checks their ‘mailbox’ where emails are stored.

Id.

8. See Press Release, supra note 3 (describing how sting operations work). In facilitating these sting operations, members of Perverted Justice, an Internet watchdog group and paid consultants to Dateline NBC, pretend to be young teens (ranging in age from eleven- to fifteen-years-old) chatting with adults online; in all cases, the decoys reveal their assumed ages to the adult. See id. (same). Most of the men caught in the investigation attempted to solicit the Perverted Justice decoys for sex. See id. (same). Most of the men caught in the investigation attempted to solicit the Perverted Justice decoys for sex. See id. (explaining predators frequently solicit decoys for sex). Some sent graphic images as well. See id. (mentioning other behavior encountered by decoys during conversations with predators); see also Young People Subjected to Sexual Predators—Part I (CNN News broadcast May 3, 2006) (describing how sting operations are set up). A typical sting operation is conducted as follows:
   [T]he first thing that we do is act like a child. We go on to one of the Internet sites, whether it’s MySpace, Yahoo, AOL, and we simply go into a very generic chat room.

   It could be a New Jersey chat room, a New York chat room, and . . . [w]e say, “Hello, I’m a 14-year-old girl,” and from there, the fun begins, and we get hit on by man, after man, after man wanting to send us a
meet the child and engage in previously-discussed sexual acts, the adult is instead greeted by government agents and arrested. 9

Because the Internet has exponentially increased potential predators’ access to children, government agencies have implemented sting operations at the local, state and national levels to effectuate the arrests of pedophiles that use the Internet to find and solicit minors for sex. 10 The Third Circuit Court of Appeals recently considered the government's use of manpower. 11

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9. See Press Release, supra note 3 (explaining how alleged predators are caught). Dateline NBC and Perverted Justice team up with local law enforcement in each investigation location. See id. (explaining protocol of sting operation). When the subjects appear at the agreed-upon meeting spot expecting a rendezvous with the child, they are arrested and charged. See id. (same).

10. See Posting of Jesamyn Go to Inside Dateline, http://www.msnbc.msn.com/id/15157004/ (Oct. 6, 2006, 11:55 EST) (defining “predator”). “You’re not a predator if you have occasional fantasies about underage teens and don’t take it further than that. Predators take it to the next step by seeking out images, chats and eventual meetings with kids. Any attempt to make that kind of fantasy into a reality is predatory.” Id. (quoting Robert Weiss, Executive Director and founder of the Sexual Recovery Clinic in California) (establishing definition of “predator”).

11. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 572 (4th ed. 2000) (establishing that criteria for pedophilia is “[o]ver a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger)”). To be diagnosed, the person must be at least sixteen years of age and at least five years older than the child or children. See id. at 571 (providing further diagnostic criteria). For the purposes of this Casebrief, the terms “predator” and “pedophile” will be used interchangeably.

12. See Christa M. Book, Comment, Do You Really Know Who is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children, 14 ALB. L.J. SCI. & TECH. 749, 753-54 (2004) (noting children are assisting in catching predators by teaching FBI agents nationwide how to communicate like teenage girls). Additionally, “[m]any . . . local police departments . . . now have officers or detectives who [ ] specialize in Internet sex crimes.” Id. at 751 (alteration in original) (quoting Russell Lissau, Police Hook Pedophile on Web in Five Seconds, CNN, July 24, 2000, http://www.cnn.com/2000/LOCAL/westcentral/07/24/ahd.police.web) (establishing sting operations are happening at local level); see also NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER viii (2006), http://www.unh.edu/ccrc/pdf/CV138.pdf [hereinafter ONLINE VICTIMIZATION OF YOUTH] (discussing federal law enforcement initiatives directed towards those who use Internet to harm children and commenting that specialized training centers have been established to assist law enforcement officers at state and local level in investigating online crimes against children).
ment’s role in these sting operations, an issue of first impression within the circuit. In *United States v. Tykarsky*, the court determined that law enforcement officers acted within the statutory limits of 18 U.S.C. §§ 2422(b) and 2423(b) when they posed as a minor during a sting operation. Furthermore, the court held that it was unnecessary for the transaction to involve an actual minor. In reaching this conclusion, the Third Circuit appropriately rejected the defense of impossibility in cases where government decoys have been used to ensnare pedophiles that use the Internet to find and solicit minors for sex; however, it did not rule on the viability of other possible defenses.

This Casebrief examines the Third Circuit’s reasoning in *Tykarsky* and examines several alternative defenses that future defendants are likely to raise now that legal impossibility is not a viable option within the circuit. Part II provides background information on two topics. First, it details the process that Internet predators use to find their victims and potentially lure them into a relationship. Second, it discusses the history and applicability of the theory of impossibility, as well as the approaches of other

13. See United States v. Tykarsky, 446 F.3d 458, 465 (3d Cir. 2006) ("This case presents the first opportunity for us to address whether the attempt provision of § 2422(b) and the travel provision of § 2423(b) require the involvement of an ‘actual minor.’").

14. 446 F.3d 458 (3d Cir. 2006).

15. 18 U.S.C. § 2422(b) (Supp. IV 2004). This section states: Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

Id.

16. 18 U.S.C. § 2423(b) (Supp. IV 2004). This section, entitled “Travel with intent to engage in illicit sexual conduct,” states: A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

Id.

17. See *Tykarsky*, 446 F.3d at 468 (noting government’s dependence on sting operations in enforcing child predation crimes and concluding Congress did not intend to prohibit this method of enforcement); see also H.R. Rep. No. 105-557, at 19 (1998) (asserting Committee’s position that “law enforcement plays an important role in discovering child sex offenders on the Internet before they are able to victimize an actual child”).

18. See *Tykarsky*, 446 F.3d at 468-69 ("[W]e hold that the lack of an actual minor is not a defense to a charge of attempted persuasion, inducement, enticement or coercion of a minor in violation of § 2422(b).”)

19. See *id.* at 464, 476 n.13 (noting denial of Tykarsky’s sentencing entrapment defense by district court due to lack of support for this defense in record).

20. For a discussion of the luring process used by Internet predators, see infra notes 30-39 and accompanying text.
circuit courts in handling cases involving online sting operations. Part III establishes the facts and procedural posture of Tykarsky and analyzes the reasoning employed by the Third Circuit in reaching its conclusion in Tykarsky. Part IV outlines the alternative defenses available to defendants in lieu of legal impossibility, specifically entrapment, sentencing entrapment and the fantasy/role playing defense. Finally, Part V concludes with recommendations for practitioners, including how to successfully anticipate, prepare for, and litigate alternative defense claims.

II. BACKGROUND

A. Pedophiles’ Playground: The Internet

The Internet is an invaluable tool for pedophiles, providing easy, instantaneous access to millions of children at any given time. The anonymity of the history and applicability of the doctrine of impossibility, see infra notes 40-61 and accompanying text. For a discussion of how other circuit courts have handled similar cases, see infra notes 62-66 and accompanying text.

22. For a discussion of the facts and procedural posture of United States v. Tykarsky, see infra notes 67-81 and accompanying text. For a discussion of the Third Circuit’s reasoning in Tykarsky, see infra notes 82-94 and accompanying text.

23. For a discussion of the potential alternative defenses that defendants are likely to raise, see infra notes 95-121 and accompanying text.

24. For a discussion of recommendations to practitioners for ways in which to effectively prepare for and litigate such cases, see infra notes 122-129 and accompanying text.

25. See ProtectKids.com, Protecting Children in Cyberspace, http://www.protectkids.com/dangers/onlinepred.htm (last visited Sept. 27, 2007) (“Often we think of pedophiles as having access to children out on the playground and other places, but because of the way the Internet works, children can actually be interacting on their home computers with adults who pretend to be children.”).

26. See AMANDA LENHART ET AL., P E W I N T E R N E T & A M E R I C A N L I F E P R O J E C T, TEENS AND TECHNOLOGY: YOUTH ARE LEADING THE TRANSITION TO A FULLY WIRED AND MOBILE NATION (2005), http://www.pewinternet.org/pdfs/PIP_TEens_Tech_July2005web.pdf (finding eighty-seven percent of teens aged twelve through seventeen use Internet, and approximately eleven million teens go online daily); see also ONLINE VICTIMIZATION OF YOUTH, supra note 12, at 71 (estimating that there are 24,780,000 Internet users ranging in age from ten to seventeen-years-old); DONALD F. ROBERTS ET AL., THE HENRY J. KAISER FAMILY FOUNDATION, GENERATION M: MEDIA IN THE LIVES OF 8-18 YEAR-OLDS 30 (2005), http://www.kff.org/entmedia/upload/Generation-M-Media-in-the-Lives-of-8-18-Year-olds-Report.pdf (finding fifty-four percent of United States eight- to eighteen-year-olds use computers daily for recreational purposes and that average time devoted on daily basis to recreational computer use is over one hour). The study also found that more than half of the time eight- to eighteen-year-olds spend on the computer daily is devoted to online activities. See id. (reporting that Instant Messaging, visiting websites, visiting chat rooms, and sending emails accounts for more than half of time spent by eight- to eighteen-year-olds on computer). The study further discovered that as children get older, the amount of time spent each day on the computer increases, and this increased usage is accompanied by a corresponding increase in the amount of time spent Instant Messaging and visiting websites. See id. (noting relationship between age and computer usage and commenting that increase in overall computer time “is mirrored in the averages for [w]eb sites and [I]nstant [M]essaging”).
mous nature of the Internet serves as a protective shield for predators, allowing them to create identities that fail to raise children’s suspicions, while simultaneously minimizing their chances of identification and capture.27 Furthermore, Congress has yet to draft a statute that successfully regulates inappropriate materials on the Internet and can withstand First Amendment scrutiny by the courts.28 The consequence of this failure by the federal government is that there is virtually no regulation on the information that minors can access on the Internet, while predators are simultaneously left with an ideal setting in which to execute their deviant fantasies.29

B. Pedophiles’ Bag of Tricks: The Luring Process

The “getting-to-know-you” questions that are the hallmark of a new friendship are ostensibly harmless; they take on a sinister cast, however, when an Internet predator is the one doing the asking.30 Predators will initially contact many children in an attempt to find one that matches their preferences, is responsive to the predators’ conversation and questions and is not subject to strict parental supervision.31 Once predators have a willing victim, they will use the “befriending” process to create a

27. See M. Megan McCune, Comment, Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws, 14 CommLaw Conspectus 503, 506 (2006) (noting that sexual predators use anonymous nature of Internet to “creat[e] an identity that may not cause youth to be alarmed”); see also Book, supra note 12, at 750 (stating that pedophiles’ odds of being caught are very low because they do not have to reveal true identity); Sandra M. Klepach, Officers Troll Internet To Reel In Sex Predators: Undercover Detectives Protect Local Children From Online Strangers who Travel for Trysts, Akron Beacon Journal, July 10, 2006, at A1 (explaining why predators are attracted to Internet for purposes of soliciting children).

Anonymity, opportunity and the instant gratification of online chats attract criminals who may not otherwise act on their compulsions, said Gail Carmon, supervisor of mental health and substance abuse services at the Medina [Ohio] County Jail. “But I also think the longer they engage in these behaviors, the sort of bolder they become,” she said. “The Internet . . . gives them this sense that they can be behind the scenes, can be testing the waters in their own living room.”

Id.

28. See McCune, supra note 27, at 507 (commenting that although federal government recognizes danger posed to children by Internet, it has failed to create statutory regulations able to withstand First Amendment scrutiny).

29. See id. (noting that consequences of government’s failure to create statutory regulations on Internet content is that youth have no limitations on materials they can access); see also Sheetz, supra note 1, at 419-20 (observing that Internet is ideal setting for fulfillment of predators’ deviant behavior due to its fantasy-like qualities).

30. See generally McCune, supra note 27, at 512-13 (describing luring process).

31. See Book, supra note 12, at 756 (explaining how online predators select victims); see also Jennifer Gregg, Note, Caught in the Web: Entrapment in Cyberspace, 19 Hastings Comm. & Ent. L.J. 157, 162 (1996) (describing how predators “stake out” chat rooms frequented by teenagers until they find one suited to their preferences, at which point predator will invite teen to talk privately).
relationship with the child, to tap into the child's vulnerabilities and to learn about and test the child's limits. As it is important during this phase that the child perceives the predator as understanding and affectionate, predators will often give the child gifts to facilitate the formation of this perception. To safeguard the relationship from parental interference, predators will typically go to great lengths to ensure that the child keeps the communication a secret.

Once predators have established a solid relationship with the child, they will reveal their sexual motives and desires to the child. For example, predators will often send links to pornographic websites in an effort to counter possible resistance and lower the child's inhibitions. Predators may also offer to provide the child drugs or alcohol to calm the child's nerves about engaging in the sexual activity. The luring process will often culminate in a face-to-face meeting between the predator and the child; alarmingly, a majority of children who meet an online predator

32. See McCune, supra note 27, at 513 (describing how predators use child's online profile to learn about child's likes and dislikes and then assert same likes and dislikes to create rapport with child). During the befriending process, which typically lasts at least one month, predators will take advantage of the trust they have gained from the child by asking the child personal questions to learn about the child's insecurities. See id. (describing techniques used by predators to gain information about child). Predators rarely resort to deception or violence, choosing instead to cater to the victim's interest and curiosity in sex and romance. See Online Victimization of Youth, supra note 12, at 24 (describing solicitation tactics of predators).

33. See Book, supra note 12, at 757 (acknowledging that children who are neglected or feel neglected are often most susceptible to online predators, which is why predators try to portray themselves as affectionate and understanding); see also Janis Wolak et al., Escaping or Connecting? Characteristics of Youth Who Form Close Online Relationships, 26 J. Adolescence 105, 110 (2003) (reporting risk factors associated with forming close online relationships). Girls who reported high levels of parent-child conflict and being highly troubled were more likely than other girls to form close online relationships. See id. at 110 (establishing problem characteristics that are associated with close online relationships among girls). For boys, five factors were significantly associated with the formation of close online relationships: being non-Hispanic white, having low communication with their parents, being highly troubled, having high amounts of Internet use, and having home Internet access. See id. at 113-15 (providing problem characteristics that are associated with close online relationships among boys).

34. See Book, supra note 12, at 757 (listing potential tactics employed by predators to ensure child keeps relationship secret). These techniques include, inter alia, teaching the child to permanently delete emails, urging the child to set up a separate email account, or providing the child with prepaid calling cards in order to have covert phone conversations. See id. (same).

35. See McCune, supra note 27, at 513 (explaining that majority of predators introduce sexual topics to child once befriending process has concluded).

36. See Book, supra note 12, at 757 (detailing techniques employed by predators to lower child's inhibitions about engaging in sexual activity with predators); see also Gregg, supra note 31, at 163 (noting predators' luring techniques include "sending pictures of himself or herself, pictures of nude children, or requesting pictures from the underage victims").

37. See Book, supra note 12, at 757 (providing additional techniques).
face-to-face will also willingly accompany the predator to another location, substantially increasing the dangerousness of the situation. The consequences of these meetings can be devastating to the child—a victim of sexual abuse often suffers from severe psychological damage, likely to have a permanent impact on the victim’s life.

C. Pedophiles’ Go-To Defense: The “Murky” Doctrine of Impossibility

 Defendants ensnared in Internet sting operations have consistently relied on impossibility, a defense with deep historical underpinnings traceable to the English common law system. When the theory was initially introduced in the English courts, defendants’ culpability was measured “by looking at the completed crime and whether completion was factually possible.” Various judicial systems ultimately established distinctions within the doctrine, leading to the creation of two separate prongs: factual impossibility and legal impossibility. As applied to attempt crimes, defendants raise this defense to argue that the defendants’ action could not result in the commission of the underlying offense because the context of the situation made completion of the offense impossible.

38. See McCune, supra note 27, at 513-14 (outlining face-to-face portion of luring process and dangers it poses to children). Additionally, just under half of children who meet sexual predators face-to-face will spend the night with them. See id. at 514 (describing potential outcome of face-to-face encounters between children and predators).

39. See Seto, supra note 4, at 76 (recognizing face-to-face meetings can cause child to experience feelings of “guilt, betrayal, rage, and worthlessness”); see also Book, supra note 12, at 757-58 (noting abuse can have “life-altering” effects on victims, including but not limited to “depression, eating disorders, distrust, [and] sexual dysfunction”). Additionally, victims may develop self-destructive behaviors such as “cutting or burning [themselves] . . . alcohol or drug abuse, excessive risk taking, withholding food or overeating, poor hygiene, excessive bathing, or suicide attempts.” See Book, supra note 12, at 758 (listing potential negative side effects of sexual abuse on children).

40. See United States v. Tykarsky, 446 F.3d 458, 465 (3d Cir. 2006) (quoting United States v. Hsu, 155 F.3d 189, 199 (3d Cir. 1998)) (observing that “[t]he law of impossible attempts has received much scholarly attention, but remains a murky area of the law”).


42. See Rogers, supra note 41, at 494 (detailing how culpability was measured in original impossibility defense).

43. See id. (suggesting that distinction between factual and legal impossibility is further evidence of judicial discomfort with punishing unconsummated crimes).

44. See Brodie, supra note 41, at 237 (explaining impossibility defense).
1. Factual Impossibility

Factual impossibility exists in situations where the defendant’s intended criminal conduct was thwarted by unforeseen circumstances that prevented the successful consummation of the crime.\(^45\) The Third Circuit further clarifies that factual impossibility occurs when “extraneous circumstances unknown to the actor or beyond his control” act as an obstacle to the defendant’s completion of the intended crime.\(^46\) An illustration of factual impossibility is when someone fires a shotgun at a bed with the intent of killing the person in the bed, but does not realize that the intended victim is not in the bed at the time the shot is fired.\(^47\) Common law provides that the doctrine of factual impossibility is not a viable defense.\(^48\) The imposition of criminal liability for attempt in situations involving factual impossibility is generally a result of courts’ emphasis on “proof of [the defendant’s] intent to commit a specific crime,” rather than the actual results of the defendant’s efforts.\(^49\)

2. Legal Impossibility

Legal impossibility exists when the act committed was not in fact illegal.\(^50\) Legal commentators, however, have further nuanced the concept of impossibility by subdividing legal impossibility into two different categories: “hybrid” legal impossibility and “pure” legal impossibility.\(^51\) Hybrid legal impossibility exists when “the actor’s goal is illegal, but commission

\(^{45}\) See United States v. Frazier, 560 F.2d 884, 888 (8th Cir. 1977) (defining factual impossibility).


\(^{47}\) See id. (quoting United States v. Hsu, 155 F.3d 189, 199 (3d Cir. 1998)) (providing example of factual impossibility); see also Berrigan, 482 F.2d at 188 (same). As explained by the Berrigan court, “[t]he classic example [of factual impossibility] is the man who puts his hand in the coat pocket of another with the intent to steal his wallet and finds the pocket empty.” Berrigan, 482 F.2d at 188 (same).

\(^{48}\) See Tykarsky, 446 F.3d at 465 (recognizing that common law provides that factual impossibility is not permissible defense); see also Frazier, 560 F.2d at 888 (noting that distinction exists between factual and legal impossibility and stating that only legal impossibility is permissible defense); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 6.3(a)(2) (2d ed. 1986) (“All courts are in agreement that what is usually referred to as ‘factual impossibility’ is no defense to a charge of attempt.”).

\(^{49}\) See Berrigan, 482 F.2d at 188 (noting that factual impossibility cases resulting in criminal liability typically turn on proof of intent).

\(^{50}\) See Tykarsky, 446 F.3d at 465 (stating that “[l]egal impossibility is said to occur where the intended acts, even if completed, would not amount to a crime” (quoting Hsu, 155 F.3d at 199)).

\(^{51}\) See Rogers, supra note 41, at 494-95 (noting that legal scholars such as Professor Joshua Dressler have identified two types of legal impossibility); see also Tykarsky, 446 F.3d at 465 n.3 (setting forth difference between “pure” legal impossibility and “hybrid” legal impossibility).
of the offense is impossible due to a factual mistake . . . regarding the legal status of some attendant circumstance that constitutes an element of the charged offense."52 Some examples of hybrid legal impossibility include a hunter shooting a stuffed deer having mistakenly believed it to be alive, or a prisoner attempting to smuggle letters past the prison warden under the mistaken belief that the warden has prohibited this conduct.53 This doctrine has received criticism due to the barely distinguishable semantic difference between hybrid legal impossibility and factual impossibility.54

In the alternative, pure legal impossibility exists when "the intended acts, even if completed, would not amount to a crime."55 Under pure legal impossibility, the defendant's impure intentions are not relevant because there is no law criminalizing the defendant's conduct.56 For instance, if a person held a poker game in a Las Vegas hotel room, with the intent to break a gambling law, no attempt would exist due to the fact that it is impossible to gamble illegally in Las Vegas.57 Despite courts' difficulty in differentiating between the various forms of impossibility, pure legal impossibility remains a viable defense and, if legal impossibility exists  

52. See Rogers, supra note 41, at 495 (quoting Joshua Dressler, Understanding Criminal Law § 9.01[B] (3d ed. 2001)) (defining hybrid legal impossibility); see also Jeffrey T. Goudie, Case Digest, Criminal Law—Doctrine of Impossibility—The Doctrine of Impossibility Does Not Provide a Defense to Attempted Distribution of Obscene Material to a Minor or to Solicitation of Third-Degree Criminal Sexual Conduct. People v. Thousand, 631 N.W.2d 694 (Mich. 2001), 80 U. Det. L. Rev. 175, 176 (2002) ("[H]ybrid legal impossibility exists if the defendant's intended act constitutes a crime but consummation of the crime is impossible because of a factual mistake regarding the legal status of his behavior.").

53. See Tykarsky, 446 F.3d at 465 (providing examples of hybrid legal impossibility).

54. See Rogers, supra note 41, at 498 (quoting Dressler, Understanding Criminal Law § 9.01[B] (3d ed. 2001)) (noting that "by skillful characterization, one can describe virtually any case of hybrid legal impossibility . . . as an example of factual impossibility"). Accordingly, the drafters of the Model Penal Code asserted that the distinction between factual and legal impossibility should be abolished for several reasons. See id. at 499 (stating reasoning of drafters). These reasons included:

[L]egal impossibility doctrine focuses unnaturally on what actually transpired rather than what defendant believed, leading to strained reasoning at odds with conventional understanding of terms such as intent and purpose. Second, the Model Penal Code drafters opined that the proper approach to criminality should focus on the dangerousness of the actor as manifested by his intent, rather than his actions.

Id.; see also Model Penal Code § 5.01 cmt. 3(a)-(c) (describing reasons for rejecting impossibility defense).

55. See Tykarsky, 446 F.3d at 465 (quoting Berrigan, 482 F.2d at 188) (defining pure legal impossibility).

56. See Rogers, supra note 41, at 495 (explaining that "ignorance of the lack of a law criminalizing a defendant's conduct cannot inculpate him").

57. See Brodie, supra note 41, at 238 (providing example of legal impossibility).
ists, the presence of factual impossibility is thereafter irrelevant to the inquiry.58

3. Impossibility and Internet Sting Operations

As applied to Internet sting operation cases, defendants use impossibility to assert that it was legally impossible for them to persuade a minor to engage in sexual activity because the "minor" was actually an adult government decoy, and therefore any sexual activity that occurred between the defendant and the decoy would not have constituted a criminal action.59 The government's counterargument to this assertion is that the defendant's conduct was actually factually impossible, because the defendant fully intended to engage in the conduct proscribed by the law and failed only because of circumstances unknown to and beyond the control of the defendant (namely, that the defendant was communicating with a non-minor).60 This distinction is dispositive to the court's ruling on the matter; however, defendants have generally been unsuccessful in prevailing on this distinction.61

D. Pedophiles Test Their Luck in the Circuit Courts

A direct correlation exists between the Internet's saturation of American culture and the number of sexual offenses committed against children.62 This increase in online sexual offenses has been accompanied by

58. See Rogers, supra note 41, at 500 (stating that legal impossibility remains valid defense despite its controversial nature). Professor Rogers asserts that the defense of legal impossibility has retained its viability for a variety of reasons: first, some courts specifically permit it; second, other courts decline to address it and base rulings on factual impossibility instead, leaving legal impossibility as a potential option; and third, based on courts' imprecise use of the term. See id. (listing reasons why legal impossibility remains valid defense); see also Brodie, supra note 41, at 240 (stating that court's finding of legal impossibility renders presence of factual impossibility irrelevant).

59. See, e.g., Tykarsky, 446 F.3d at 465 (establishing defendants' theory of impossibility in Internet sting operation cases and explaining grounds for defendants' belief that their conduct should qualify as legally impossible rather than factually impossible).

60. See id. (explaining government's position on why defendant's conduct should be categorized as factually impossible rather than legally impossible).

61. See Brodie, supra note 41, at 238 (emphasizing that courts' determination of whether case involves legal or factual impossibility is dispositive); see also Book, supra note 12, at 772 (commenting that "impossibility defense does not seem to be working for defendants"). For further discussion of how courts have handled the impossibility defense in Internet sting operation cases, see infra notes 66 and 79 and accompanying text.

62. See Seto, supra note 4, at 75 (observing that research has confirmed that as volume of people with Internet access increases, so has "the number of incidents of child pornography and other kinds of sexual crimes against children" (quoting Ashley A. Halfman, Giving Offenders What They Deserve: Amendments to Federal Sentencing Guidelines Section 2G2.2, Addressing Child Pornography Distribution, 36 Ga. L. Rev. 219, 225 (2001))); see also Online Victimization of Youth, supra note 12, at 1 (providing results of recent report tracking online activities of youth). This recent
an increase in the number of suits against online predators. While this is an issue of first impression in the Third Circuit, other circuit courts have already had an opportunity to evaluate cases involving Internet predators snared in sting operations. Specifically, the Fifth, Sixth, Ninth, Tenth and Eleventh Circuits have all addressed the viability of the impossibility defense in Internet predator cases. Each of these courts has concluded that a defendant's mistaken belief as to the age of the intended victim is insufficient to relieve the defendant of criminal liability, and that an actual minor's involvement is unnecessary for conviction.

III. ANALYSIS

A. A Local Pedophile in Action: United States v. Tykarsky

1. Facts

After entering an America Online ("AOL") chat room entitled "Ilove-oldermen2," Todd Tykarsky, a forty-year-old man using the screen name "toddyty63," initiated a conversation with "HeatherJet14," a government report found that between February 2000 and March 2005, the number of youth Internet users who encountered unwanted exposure to sexual materials and online harassment increased, despite the fact that during this same time period, there was an increase in the use of filtering, blocking and monitoring software in the homes of youth Internet users. See Online Victimization of Youth, supra note 12, at 1 (same).


64. See Tykarsky, 446 F.3d at 465 (noting this issue had not previously arisen within Third Circuit). For a discussion of the cases adjudicated by other circuit courts, see infra notes 66, 79 and 84 and accompanying text.

65. For a discussion of the cases adjudicated by other circuit courts, see infra notes 66, 79 and 84 and accompanying text.

66. See, e.g., United States v. Sims, 428 F.3d 945, 959-60 (10th Cir. 2005) (determining that defendant cannot assert his false belief that minor was involved as defense to charge involving enticement and exploitation of minors); United States v. Meek, 366 F.3d 705, 720 (9th Cir. 2004) (finding that "[t]he fact that [defendant] was mistaken in his belief that he was corresponding with a minor does not mitigate or absolve his criminal culpability"); United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (holding that "belief that a minor was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b)"); United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001) (concluding that legal impossibility is normally not defense to attempt to violate § 2422(b)); United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000) (holding that attempt provision of § 2422(b) is constitutional and that restriction "does not infringe on any constitutionally protected rights of adults").

agent posing as a fourteen-year-old girl.\textsuperscript{68} Over the course of the next month, Tykarsky and “HeatherJetl4” engaged in multiple conversations via both Instant Messenger and email, during which Tykarsky expressed his strong desire to engage in sexual activity with “HeatherJet14.”\textsuperscript{69} Approximately two weeks into the online relationship, upon Tykarsky’s request for pictures of “HeatherJet14,” the government decoy provided a photograph of herself at age fourteen or fifteen.\textsuperscript{70} Shortly thereafter, in spite of admitting that he was “a little scared” because of her young age, Tykarsky and the decoy discussed the possibility of a face-to-face meeting.\textsuperscript{71} Roughly one week later, after Tykarsky and the decoy agreed upon a meeting location, Tykarsky described in explicit detail the sexual activities he planned to engage in with the minor upon their meeting.\textsuperscript{72}

On the day of the planned rendezvous, Tykarsky arrived at the agreed-upon location and entered the hotel, where he was arrested and searched by Federal Bureau of Investigation (“FBI”) agents.\textsuperscript{73} During the course of a subsequent interrogation, to which Tykarsky consented, the FBI elicited incriminating statements from Tykarsky regarding his intention to have sex with “HeatherJet14,” despite his belief that she was only fourteen years old.\textsuperscript{74} In addition, after his arrest, Tykarsky consented to a search of his home, which by extension included his computer.\textsuperscript{75} Based on his confession, as well as articles seized from his home, Tykarsky was charged with interstate travel to engage in illicit sexual conduct with a

\textsuperscript{68} See Tykarsky, 446 F.3d at 461 (setting forth relevant facts of case). In addition to the screen name “toddyty63,” Tykarsky also communicated with “HeatherJet14” using the screen name “golpher12345.” \textit{See id.} (same).

\textsuperscript{69} See id. (noting that conversations occurred between Tykarsky and government decoy on at least eight different occasions, and commenting on explicit sexual nature of those conversations).

\textsuperscript{70} See id. at 462 (recounting that, upon Tykarsky’s request, government decoy supplied photographs of herself).

\textsuperscript{71} See id. (observing that Tykarsky commented he could get into trouble and go to jail if his relationship with “HeatherJet14” was discovered).

\textsuperscript{72} See id. (describing meeting arrangements between Tykarsky and government decoy and noting Tykarsky’s continued excitement to meet “HeatherJet14”).

\textsuperscript{73} See id. (detailing facts of Tykarsky’s arrest).

\textsuperscript{74} See id. (establishing that Tykarsky admitted to knowing “HeatherJet14” was only fourteen years old, that he thought about having sex with her and that although he thought he should not follow through with it, he ultimately proceeded with plans to meet her).

\textsuperscript{75} See id. (describing search of Tykarsky’s home). The search was conducted pursuant to Tykarsky’s consent and to a search warrant. \textit{See id.} (detailing relevant facts). Upon searching Tykarsky’s residence, FBI agents seized his computer, which was subsequently analyzed by the Computer Analysis Response Team (“CART”), a subdivision of the FBI. \textit{See id.} (same). CART’s analysis confirmed that Tykarsky’s computer had software and “buddy lists” affiliated with both screen names used by Tykarsky in his conversations with the government decoy. \textit{See id.} (same). Both buddy lists included the screen name “HeatherJet14.” \textit{See id.} (same). Additionally, a copy of the photograph that the decoy had sent to Tykarsky was recovered from his computer’s hard drive. \textit{See id.} (same).
minor (count one)\textsuperscript{76} and using an interstate facility to attempt to persuade a minor to engage in illegal sexual activity (count two).\textsuperscript{77}

2. Procedural Posture

Prior to his trial, Tykarsky filed a motion asserting a legal impossibility defense based on the fact that an actual minor had not been involved in the transaction.\textsuperscript{78} Relying on appellate court decisions, the district court denied Tykarsky's motion, rejecting his impossibility defense and holding that "[a]n actual victim is not required for a prosecution of attempt under § 2422 or for travel with the requisite intent under § 2423."\textsuperscript{79} At trial,

\textsuperscript{76} See id. at 462 n.1 (detailing charge against Tykarsky). Count one of the indictment charged as follows:

On or about May 21, 2003, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant TODD TYKARSKY a/k/a "toddty63," a/k/a "golpher12345," traveled from New Jersey to Philadelphia, Pennsylvania for the purpose of engaging in, and attempting to engage in, illicit sexual conduct, as defined in Title 18, United States Code, Section 2243(f), that is, a sexual act as defined in Title 18, United States Code, Section 2246(2), with a person under eighteen years of age. In violation of Title 18, United States Code, Section 2423(b) and (e).

\textsuperscript{77} See id. at 463 n.2 (detailing charges against Tykarsky). Count two of the indictment charged as follows:

Between on or about April 22, 2003 and on or about May 20, 2003, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant TODD TYKARSKY a/k/a "toddty63," a/k/a "golpher12345," used a facility in interstate commerce, that is, a computer modem connected to the Internet to attempt to knowingly persuade, induce, entice and coerce a person under eighteen years of age to engage in sexual activity for which the defendant could be charged with a criminal offense, that is, statutory rape, in violation of New Jersey Statutes 2C:14-2 and Title 18, Pennsylvania Consolidated Statutes Annotated, Section 3122.1. In violation of Title 18, United States Code, Section 2422(b).

\textsuperscript{78} See id. at 463 (explaining grounds for impossibility defense). Apart from the motion to dismiss the indictment based on the impossibility defense, Tykarsky filed three other motions: first, prior to his trial, he filed a motion to suppress the statements he made to FBI officers immediately after his arrest; second, after the verdict, he filed a motion for judgment of acquittal and a new trial pursuant to Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure; and third, after the denial of his post-trial motions but before sentencing, he filed a motion for discovery of additional exculpatory evidence. See id. at 463-64 (setting forth Tykarsky's additional motions).

\textsuperscript{79} See id. at 463 (establishing that district court rejected impossibility defense and holding, based on statutory text, that actual minor is not necessary); see also United States v. Meek, 366 F.3d 705, 718 (9th Cir. 2004) (observing that inclusion of attempt provision in 18 U.S.C. § 2422(b) "underscores Congress's effort to impose liability regardless of whether the defendant succeeded in the commission of his intended crime"); United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (noting that attempt provision indicates that "[t]he fact that [the defendant's] crime had not ripened into a completed offense is no obstacle to an attempt conviction"); United States v. Farner, 251 F.3d 510, 512 (5th Cir. 2001) ("The distinction between factual and legal impossibility is elusive at best. Most federal courts
Tykarsky was convicted on both counts and sentenced to five years in prison. Shortly thereafter, Tykarsky appealed to the Third Circuit.

B. The Third Circuit’s Reasoning

In analyzing Tykarsky’s legal impossibility challenge, the Third Circuit first acknowledged the problematic nature of this defense due to the elusive distinction between legal and factual impossibility. According to the court, however, the issue of whether impossibility applies is not a matter of semantically differentiating between factual and legal impossibility, but rather a matter of legislative intent. To ascertain Congress’s intent regarding the attempt provision of 18 U.S.C. § 2422(b), the court initially looked to the language of the statute, and concluded that Congress did not intend for the actual persuasion of a minor to be necessary for a conviction. Expanding upon the presumed purpose of the intent provision, have repudiated the distinction or have at least openly questioned its usefulness.”

Regarding Tykarsky’s other motions, the district court denied his motion to suppress statements he made to the FBI officers after his arrest because the court determined that he knowingly and voluntarily waived his Miranda rights prior to speaking with the officers. See Tykarsky, 446 F.3d at 463 (describing reasoning of lower court). The district court also denied Tykarsky’s motion for a judgment of acquittal and a new trial because the court determined that the Government had provided sufficient evidence to support an inference by the jury that Tykarsky traveled across state lines for the purpose of engaging in criminal sexual activity. See id. at 463-64 (same). His pre-sentencing motion for discovery of additional exculpatory evidence was denied after the district court deemed it a “fishing expedition.” See id. at 464 (same).

80. See Tykarsky, 446 F.3d at 463 (describing outcome of Tykarsky’s trial). At trial, the Government admitted into evidence the nine Instant Messenger and email conversations that occurred between Tykarsky and the government decoy, Tykarsky’s statements during his post-arrest interrogation, evidence seized from his computer during the lawful search of his home and testimony from the FBI case agent who documented the interrogation that occurred at the arrest scene. See id. (detailing evidence presented at trial). Tykarsky did not testify in his own defense. See id. (describing trial).

81. See id. at 464 (noting that appeal to Third Circuit followed district court’s denial of Tykarsky’s impossibility motion and asserting that Third Circuit has jurisdiction to review Tykarsky’s conviction under 28 U.S.C. § 1291 (1982) and his sentence under 18 U.S.C. § 3742 (2003)).

82. See id. at 466 (commenting on “elusiveness” of distinction between legal and factual impossibility and noting that many jurisdictions have eschewed distinction and abolished impossibility defense entirely). The court further noted that the American Law Institute’s position, as set forth in the Model Penal Code (“MPC”) Commentaries, supports the abolition of the legal impossibility defense. See id. (“The purpose of [the MPC’s definition of attempt] is to eliminate legal impossibility as a defense to an attempt charge.” (alteration in original)).

83. See id. (describing appropriate application of legal impossibility as defense within Third Circuit). “Even assuming that this is a case of legal impossibility, it is well established in this Court that the availability of legal impossibility as a defense to a crime is a matter of legislative intent.” Id. (same).

84. See id. (noting that plain language of statute, including “attempt” provision, suggests that actual persuasion of minor is not necessary for conviction);
the court explained that Congress designed the provision such that liability turns on the defendant's subjective intent, rather than the actual age of the alleged victim.\textsuperscript{85}

Noting that the purpose of the statute was to provide a comprehensive solution to prevent crimes against children, the court further concluded that Congress did not intend for legal impossibility to be a permissible defense.\textsuperscript{86} The court deemed it significant that Congress drafted and enacted § 2422(b) "at a time when 'the doctrine of impossibility had become mired in fine distinctions and had lost whatever acceptance at common law it may have possessed . . . ."\textsuperscript{87} This observation provided the court with affirmation that legal impossibility was not aligned with congressional intent.\textsuperscript{88} Finally, the court noted that if it were to

\textit{also} United States v. Meek, 366 F.3d 705, 718 (9th Cir. 2004) (noting that inclusion of attempt provision "underscores Congress's effort to impose liability regardless of whether the defendant succeeded in the commission of his intended crime"); United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (recognizing that attempt provision suggests that "[t]he fact that [the defendant's] crime had not ripened into a completed offense is no obstacle to an attempt conviction").

85. See Tykarsky, 446 F.3d at 466-67 (explaining that interpreting language of statute to require involvement of actual minor would "render the attempt provision largely meaningless").

86. See id. at 467 (noting that, as in two other Third Circuit cases, evidence in present case regarding underlying purpose of statute suggests Congress did not intend for legal impossibility to be permissible defense); see generally United States v. Hsu, 155 F.3d 189, 201 (3d Cir. 1998) (holding statute at issue was designed to be comprehensive solution for corporate espionage and that Congress could not have intended legal impossibility to apply because it would frustrate federal efforts to enforce statute); United States v. Everett, 700 F.2d 900, 904 (3d Cir. 1983) (reviewing legislative history of Drug Control Act, noting that it was designed to be comprehensive solution for drug trafficking and concluding that "Congress intended to eliminate the defense of impossibility when it enacted [this statute]"). The court further noted that 18 U.S.C. § 2422(b) was created to provide "law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our nation's children." See Tykarsky, 446 F.3d at 467 (quoting H.R. Rep. No. 105-557, at 10 (1998)) (acknowledging that Child Protection and Sexual Predator Punishment Act of 1998 was originally designed as "comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers"). The Committee also stated that "'[t]hose who believe they are victimizing children, even if they come into contact with a law enforcement officer who poses as a child, should be punished just as if a real child were involved." See H.R. Rep. No. 105-557, at 19 (1998) (establishing Committee's position on use of decoys by law enforcement officers).

87. See Tykarsky, 446 F.3d at 468 (quoting Hsu, 155 F.3d at 202) (discussing evolving views of impossibility defense). The court also noted that § 2422(b) was initially added to Title 18 in 1996, almost thirty years after the drafters of the Model Penal Code first proposed abolishing the impossibility defense. See id. (establishing impossibility was disfavored at statute's inception). For further discussion of the American Law Institute's position on legal impossibility as set forth in the Comments to the MPC, see supra note 54 and accompanying text.

88. See Tykarsky, 446 F.3d at 468 (noting elimination of legal impossibility was overwhelmingly common at time statute was enacted and concluding that it therefore was doubtful that Congress intended legal impossibility to be permissible defense to § 2422(b)).
adopt Tykarsky's interpretation of the statute, law enforcement officers would have to use actual minors when conducting sting operations, a result the court concluded Congress surely did not intend.\(^89\)

Turning its attention to § 2423(b), the court determined that neither factual nor legal impossibility applied.\(^90\) The court required only an abbreviated analysis to reach this conclusion, due to the unambiguous terms of the statute itself.\(^91\) In affording the district court's denial of Tykarsky's post-trial motion, the court noted that criminal liability "'turns simply on the purpose for which [the defendant] traveled.'"\(^92\) Additionally, the court held that there was sufficient evidence on which the jury could base a finding that Tykarsky traveled from New Jersey to Pennsylvania for the purpose of engaging in sexual activities with a minor.\(^93\) The court therefore affirmed Tykarsky's conviction under § 2423(b).\(^94\)

IV. APPLICATION OF THE THIRD CIRCUIT'S TYKARSKY DECISION

A. Predictions of Alternative Defenses Likely to be Raised by Third Circuit Defendants

1. Entrapment and Sentencing Entrapment

Despite the Third Circuit's invalidation of impossibility defenses, defendants charged in Internet sting operations can still raise entrapment as a potential defense.\(^95\) As set forth by the Supreme Court in Sorrells v. United States,\(^96\) entrapment occurs "when the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."\(^97\) This defense, entirely a creation of American law, is specifically directed at undercover operations.\(^98\) It serves as a means to distinguish between those defendants that

\(^89\) See id. (commenting that law enforcement's use of decoys in sting operations enforcing solicitation and child predation crimes is common knowledge and asserting that it is highly unlikely Congress intended to deprive law enforcement officers of this method of enforcement).

\(^90\) See id. (noting there is "nothing impossible about traveling with a specific purpose" (citing United States v. Sims, 428 F.3d 945, 949 (10th Cir. 2005))).

\(^91\) See id. (establishing that plain language of statute "criminalizes interstate travel for an illicit purpose").

\(^92\) See id. (quoting United States v. Root, 296 F.3d 1222, 1231 (11th Cir. 2002)) (holding that actual age of intended victim is not element of offense).

\(^93\) See id. (concluding purpose of Tykarsky's travel falls within statutorily prohibited conduct).

\(^94\) See id. (setting forth court's holding regarding § 2423(b)).

\(^95\) See United States v. Brand, 467 F.3d 179, 195 (2d Cir. 2006) (addressing and rejecting defendant's entrapment defense to charges under 18 U.S.C. §§ 2422(b) and 2423(b)), cert. denied, 127 S.Ct. 2150 (2007).

\(^96\) 287 U.S. 435 (1932).

\(^97\) See id. at 442 (defining entrapment).

\(^98\) See Dru Stevenson, Entrapment by Numbers, 16 U. Fla. J.L. & Pub. Pol'y 1, 7-9 (2005) (noting entrapment defense is unique to America and that certain crimes
are true criminals and those who were simply coerced into an illegal activity they would not have otherwise engaged in without police inducement.\textsuperscript{99} Inducement occurs when a criminal idea is ingrained in a defendant's mind by improper government acts, such as "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on sympathy, need, or friendship."\textsuperscript{100} To assess whether a defendant has been entrapped by the government, the court must identify whether the government agent improperly induced the defendant to commit the crime and whether the defendant was predisposed to commit the crime.\textsuperscript{101}

To successfully assert an entrapment defense, defendants must provide evidence that they were not predisposed to commit the charged crime.\textsuperscript{102} Defendants may satisfy this burden by identifying such evidence in the government's case-in-chief, by eliciting such evidence during cross examination of a government witness, or by presenting their own case-in-

mandate such constant surveillance that sting operations are most "feasible and efficient" means of policing. Specifically, crimes that are "willing party" activities, "such as sexual impropriety with minors, sales of contraband and firearms, and bribery," lend themselves to regulation via undercover operations. See id. at 8-9 (explaining certain crimes are best regulated through undercover sting operations).

\textsuperscript{99} See id. at 9 (noting necessity of distinguishing between true criminals and victims of police inducement).

\textsuperscript{100} See Gregg, supra note 31, at 178 (defining "inducement"). Inducement also occurs when government actions encourage someone to turn "'from a righteous path to an iniquitous one.'" See Book, supra note 12, at 759 (quoting Marreel v. Florida, 841 So. 2d 600, 603 (Fla. Dist. Ct. App. 2005)) (listing further definitions of inducement); see also Gregg, supra note 31, at 179 (listing methods through which inducement can occur).

\textsuperscript{101} See Book, supra note 12, at 759 (discussing two-prong test for determining whether defendant was entrapped). The Supreme Court developed a two-prong test, requiring two separate threshold inquiries into inducement and predisposition; these inquiries, however, are clearly related. See Jacobson v. United States, 503 U.S. 540, 548-49 (1992) (noting prosecution's burden of proof in entrapment defense); see also Book, supra note 12, at 760 n.107 (recognizing link between inducement and predisposition); Sheetz, supra note 1, at 444 (observing that if law enforcement officer makes initial contact with potential defendant and repeatedly solicits potential defendant for criminal liability, this constitutes entrapment).

\textsuperscript{102} See Book, supra note 12, at 763 (asserting defendant's burden). This burden of proof is aligned with the subjective test of entrapment, which is the theory presented by the Supreme Court in United States v. Sorrells. See Sorrells, 287 U.S. at 442 (establishing subjective test for entrapment). This is the law in the federal courts. See Mathews v. United States, 485 U.S. 58, 62-63 (1988) (asserting subjective entrapment test is law in federal courts). Many state legislatures and several state supreme courts, however, have adopted an objective test for entrapment, which focuses on the government's role in the investigation, rather than on the accused's predisposition. See Gregg, supra note 31, at 180 (explaining development and application of objective test of entrapment). This Casebrief will focus on the subjective test and federal law. For further discussion of the objective test, see Gregg, supra note 31, at 180-86.
Assuming that the defendant is able to present sufficient evidence to satisfy this burden, "[t]he burden then shifts to the government to prove beyond a reasonable doubt that [the] defendant was not entrapped." The government will typically prevail so long as it can prove that the defendant was predisposed to commit the crime in question, independent of the government’s influence. The Supreme Court has not adopted a bright-line rule as to how the government can satisfy this burden, and instead endorses a sliding scale, requiring a greater demonstration of predisposition in situations where the government’s conduct was especially aggressive. If a defendant raises an entrapment defense, the jury instructions will likely include an instruction that a person was entrapped if “he has no previous intent or purpose to violate the law,” but is not entrapped if he was ‘ready and willing to commit crimes such as charged in the indictment, whenever the opportunity was afforded.’

103. See Book, supra note 12, at 763-64 (providing methods through which defendants may meet their burden); see also Stevenson, supra note 98, at 21 (“The level of proof required of the defendant varies somewhat from jurisdiction to jurisdiction, but is lower than a burden of proof.”).

104. See Book, supra note 12, at 764 (citing Jacobson, 503 U.S. at 549) (describing burden shifting of entrapment).

105. See id. at 771 (recognizing continued viability of entrapment defense); see also Stevenson, supra note 98, at 26 (acknowledging that “[e]ntrapment cases are necessarily a subset of the number of sting operations being conducted). As pointed out by Professor Stevenson, as the number of entrapment cases rises due to increases in the number of sting operations conducted, defendants’ likelihood of prevailing on this defense will decline. See Stevenson, supra note 98, at 26-27 (predicting limited viability of entrapment defense in future). This decline will result from the development of bright-line rules, a natural by-product of case law, which will serve to clearly define permissible law enforcement practices, making raising this defense a futile endeavor. See id. (same).

106. See Gregg, supra note 31, at 179 (noting that cases suggest Supreme Court’s endorsement of sliding scale for amount of predisposition needed). While the Supreme Court has not provided a clear test as to what factors constitute predisposition, lower federal courts have established a list of relevant factors, including:

(1) the defendant’s reluctance to respond to inducement; (2) the totality of circumstances surrounding the criminal enterprise; (3) the defendant’s state of mind prior to any overtures by the government; (4) the defendant’s involvement in pre-existing criminal conduct similar to that for which he is charged; (5) the existence of a prior plan on the part of the defendant to commit the crime for which he is charged; (6) the defendant’s prior reputation; (7) the defendant’s reluctance or eagerness during negotiations with the undercover agent; (8) whether there was a pattern of refusing the government inducements prior to the action for which the defendant is charged; (9) the nature of the crime charged; (10) the degree of coercion present in the police conduct in inducing the activity relative to the defendant’s criminal experience.

Id. (quoting United States v. Dion, 762 F.2d 674, 687-88 (8th Cir. 1985), rev’d in part, 476 U.S. 734 (1986)) (listing factors to be considered in predisposition analysis).

One possible alternative to raising traditional entrapment as a defense is asserting sentencing entrapment instead. Sentencing entrapment is a result of the implementation of mechanical sentencing guidelines; accordingly, this defense can potentially provide relief for defendants involved in sting operations in which the government agent specifically planned the terms and conditions of the sting around provisions of the sentencing guidelines in order to increase defendants’ sentences. Much like the standard entrapment defense, sentencing entrapment places the burden on defendants to show that they were not predisposed to commit the crime or crimes at issue.

In Tykarsky, the Third Circuit declined to address Tykarsky’s sentencing entrapment argument, asserting that the doctrine was not applicable to the instant situation. The Third Circuit’s refusal to address this issue, and its pointed mention of the fact that the Third Circuit has never recognized this doctrine, suggests that the court is not likely to accept this as a defense in Internet sting operation cases. Taking into account the Third Circuit’s position on the issue, together with a general disfavoring of the doctrine, defendants are unlikely to prevail on such claims, as evidenced by Tykarsky’s failed attempt.

2. Fantasy/Role Playing

Another possible defense has taken root as a result of the development of an “Internet Culture.” This culture, complete with its own set

108. See Stevenson, supra note 98, at 39 (discussing sentencing entrapment). “Sentencing entrapment” is a general phrase used to describe an entire situation, including “the agents’ tactic itself, the defense, and the body of cases or concept.” Id. at 45 (defining concept of sentencing entrapment).

109. See id. at 39-40 (explaining that agents posing as decoys online can pretend to be young enough trigger highest sentencing range).

110. See id. at 41-42 (establishing defendant’s burden when asserting sentencing entrapment).

111. See United States v. Tykarsky, 446 F.3d 458, 476 n.13 (3d Cir. 2006) (rejecting Tykarsky’s assertion that sentencing entrapment occurred because government allegedly delayed sting operation until after enhanced penalties were effected). In addition to agreeing with the district court that sentencing entrapment was not applicable in Tykarsky’s case, the court further noted that the Third Circuit has not yet recognized the doctrine of sentencing entrapment. See id. (citing United States v. Raven, 99 F.3d 428, 438 (3d Cir. 1994)) (asserting court’s current position on sentencing entrapment).

112. See id. (observing Third Circuit’s refusal to recognize sentencing entrapment and asserting that even if doctrine applied, government’s conduct was not sufficiently outrageous to qualify as sentencing entrapment).

113. See Stevenson, supra note 98, at 45 (noting that sentencing entrapment claims peaked in federal courts in 1996-1997 and commenting that such claims currently “do not fare well at all”). For further discussion of the Third Circuit’s position on sentencing entrapment, see supra notes 111-112 and accompanying text.

of social norms, is the pivotal element of the fantasy/role playing defense. The Internet has created a virtual environment in which it is acceptable for utter strangers to carry out sexual fantasies in online chat rooms featuring themes such as "submission, dominance, incest, fetishes, and homosexual fantasies." The anonymity of the Internet provides the perfect protective shield for people engaging in such behaviors, allowing users to role play while hiding their true identities. As such, defendants in sting operation cases have implemented a defense to this effect—defendants claim that they never believed they were actually speaking with a minor, but rather thought that they were conversing with an adult, engaging in a mutual, role playing fantasy with that person. Under this increasingly common defense, defendants contend that, because they never actually believed that a minor was involved, they lacked the requisite intent to "knowingly persuade[, ] induce[, ] entice[, ] or coerce[ ]" a minor, thereby relieving them of liability under 18 U.S.C. §§ 2422(b) and 2423(b). This defense is most likely to be successful in situations where the conversations between the predator and the decoy took place in chat rooms with names indicative of role playing and chat rooms that are supposedly restricted to adults. Additionally, defendants are more likely to win with this defense in situations where they made comments throughout the conversation reinforcing their position that they were only "pretending."

115. See id. at 562-63 (observing differences between traditional relationships and online relationships).

116. See id. at 563 (explaining importance of anonymity on Internet and how anonymity has resulted in establishment of new social norms regarding sexual behaviors).

117. See Book, supra note 12, at 767-68 (commenting that "by its very nature . . . the Internet is a 'fantasy world' where people role-play while hiding behind anonymity").

118. See id. at 767 (explaining nature of fantasy defense).

119. See 18 U.S.C. §§ 2422(b), 2423(b) (Supp. IV 2004) (setting forth requisite intent for conviction); see also Book, supra note 12, at 767 (describing application of fantasy defense and noting its increasing popularity in Internet sting operation cases).

120. See Book, supra note 12, at 768-69 (establishing significant facts of successful fantasy case). The fantasy defense was first utilized in the case of Patrick Naughten, a thirty-four-year-old man who was "arrested and tried for 'crossing state lines with the intent to have sex with a minor, and using the Internet to arrange to try to have sex with a minor.'" See id. at 768 (detailing facts). The minor, however, was actually a government decoy. See id. (same). Naughten, using the fantasy/role playing defense and claiming that he believed he was meeting a grown woman "who shared his 'daddy/daughter' fantasy," was acquitted due to a deadlock jury. See id. at 768-69 (detailing facts and holding). The critical aspect of his fantasy defense was that he had met the government decoy in an "adults only" chat room entitled "dad&daughtersex," which supported his position that he believed the decoy to be over eighteen years of age and a willing participant in the role playing situation. See id. at 769 (stating critical aspects of Naughten's defense).

121. See id. at 770 (explaining online predators are often aware of legal developments and will therefore insert comments into conversation suggesting they are only pretending in order to utilize fantasy defense).
B. Recommendations for Practitioners

Although defendants still attempt to employ entrapment as a defense in Internet sting operation cases, some legal commentators have declared that the traditional entrapment defense is ill-suited for Internet cases and should therefore be modified or eliminated as it applies to these cases.\footnote{122} Until such modification or elimination occurs, however, prosecutors within the Third Circuit should continue to prepare for the possibility of this defense.\footnote{123} In order to defeat a defendant’s entrapment claim, the prosecution needs to effectively establish that the defendant’s own predisposition led to the commission of the crime, rather than any actions taken by law enforcement.\footnote{124} Provided that the predator proactively logged into the suspect chat room and voluntarily engaged in repeated conversations with the decoy, this will normally be sufficient to satisfy the government’s predisposition burden.\footnote{125}

When handling an Internet sting operation case in which the defendant asserts a fantasy or role playing defense, prosecutors should refer to the transcripts of the online conversations.\footnote{126} Law enforcement agents

\footnote{122} See, e.g., Stevenson, supra note 98, at 69-70 (recognizing problematic nature of applying traditional entrapment law to Internet cases). The five primary problems with using traditional entrapment law in Internet cases are:

First, “predisposition” . . . is a foregone conclusion in almost all of the cases because the defendants actively log into certain chat rooms and engage in repeated, typed communications with their intended victims. Second, in states using the objective test, the conduct and conversations of the agents can be very difficult to trace or verify . . . . Third, the inexpensive, relatively invisible nature of such operations also permits private entrapment to become rampant, which is not the case in off-line settings or with other crimes . . . . Fourth, traditional entrapment rules have tended to relax certain evidentiary rules, particularly about admission of “past crimes.” On-line stings present special, new evidentiary problems because the on-line conversations, although recorded on a computer’s storage system, are out of context when later submitted as evidence in court . . . . Finally, many of these cases frame the charges as “attempt” crimes . . . . Most jurisdictions use a test requiring only that the defendant take some “substantial step” toward the commission of an offense in order to be convicted of attempt . . . . Not having to wait for a completed crime or transaction allows law enforcement to use simplified stings . . . .

The abbreviated fact pattern of an attempt charge gives the defense less with which to work in concocting an entrapment defense.

\textit{Id.} at 69-72 (footnotes omitted) (describing problems with entrapment defense).

\footnote{123} Cf. Stevenson, supra note 98, at 75 (stating that entrapment laws are not easily adaptable to online stings, thus changes are necessary). \textit{But see} Book, supra note 12, at 771 (noting entrapment remains viable defense).

\footnote{124} See Book, supra note 12, at 772 (commenting that defendant was likely not predisposed if it was necessary for government to continuously tempt defendant to commit crime).

\footnote{125} See Stevenson, supra note 98, at 69 (declaring that predisposition is essentially foregone conclusion when predator actively logged into certain chat rooms and engaged in conversations with intended victims).

\footnote{126} See Book, supra note 12, at 770 (stating importance of dialogue between predator and decoy).
posing as decoys are trained to constantly remind the predator of the child's alleged age; prosecutors should assert that these reminders adequately informed the defendants that they were speaking with a minor.\textsuperscript{127} In addition to the conversation transcripts, prosecutors can utilize other evidence that suggests that defendants believed they were meeting a child rather than an adult, such as small-sized sex toys that are seized at the time of arrest.\textsuperscript{128} Moreover, when conducting voir dire and selecting jurors, prosecutors should be aware that male jurors are generally more accepting of a fantasy or role playing defense than female jurors.\textsuperscript{129}

V. TTFN:\textsuperscript{130} The Third Circuit Signs Off

The gravity of the issue addressed in \textit{United States v. Tykarsky} should serve as a sobering reminder to adults of the dangers children face from their online "friends."\textsuperscript{131} As pedophiles' access to children continuously expands via the Internet, so should the access that law enforcement agents have to pedophiles through sting operations.\textsuperscript{132} In concluding that the actual involvement of a minor is not necessary to sustain a conviction under 18 U.S.C. §§ 2422(b) and 2423(b), the Third Circuit acknowledged the importance of targeting online predators and explicitly approved the use of sting operations in accomplishing this objective.\textsuperscript{133} Furthermore, in declining to accept the impossibility defense for crimes under 18 U.S.C. §§ 2422(b) and 2423(b), the court has significantly limited the options available to Third Circuit defendants seeking to challenge the charges against them.\textsuperscript{134} While entrapment and fantasy and role playing are potential defenses that provide defendants with some recourse, if the government takes appropriate actions to ensure that sting operations are

\begin{itemize}
  \item \textsuperscript{127} See \textit{id.} (declaring that constant reiteration of decoy's assumed age helps mitigate application of fantasy defense).
  \item \textsuperscript{128} See Rogers, \textit{supra} note 41, at 517 (referencing case in which defendant's belief that he was dealing with minor rather than adult was affirmed by fact that he had small-sized sex toys with him at time of face-to-face meeting).
  \item \textsuperscript{129} See Yamagami, \textit{supra} note 114, at 572 (commenting that one reason men are more willing than women to accept fantasy defense is that "men tend to be more knowledgeable about computer use and the Internet than women").
  \item \textsuperscript{130} See Online Lingo, \textit{supra} note 1 (defining "TTFN" as "ta ta for now").
  \item \textsuperscript{131} For a discussion of the dangers posed to children by the Internet, see \textit{supra} notes 25-39 and accompanying text.
  \item \textsuperscript{132} See Rogers, \textit{supra} note 41, at 523 (concluding that law enforcement's access to pedophiles should be directly correlated with pedophiles' access to children).
  \item \textsuperscript{133} For a discussion of the Third Circuit's holding and reasoning, see \textit{supra} notes 82-94 and accompanying text.
  \item \textsuperscript{134} For a discussion of the alternative defenses available to defendants, see \textit{supra} notes 95-121 and accompanying text.
\end{itemize}
conducted properly, the government should prevail when litigating against either defense.\textsuperscript{135}

\textit{Elizabeth D. Tempio}

\textsuperscript{135} For a discussion of the government's likelihood of prevailing over the alternative defenses, see supra notes 122-129 and accompanying text.