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Electronic Luring Statutes Under Fire Part II: Court Responses to Notable Defenses

(Part II of II)

By Danica Szarvas-Kidd[1]

Part I of this two-part series[2] addressed the constitutional challenges that electronic luring statutes have faced. Part II will analyze and discuss the notable defenses to crimes of electronic luring, from the defense of legal impossibility to more creative defenses such as outrageous government conduct and the wiretap defense.

Defense #1:
Impossibility Defense

The impossibility defense refers to the argument that the defendant could not have committed a crime because no child actually existed to entice for illegal sexual acts.[3] There are two challenges that are characterized as the impossibility defense: factual versus legal impossibility. Factual impossibility refers to those situations in which a circumstance or condition, unknown to the defendant, renders physically impossible the consummation of his intended criminal conduct.[4] As stated by the Fifth Circuit, "factual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be."[5] Legal impossibility, on the other hand, refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime.[6] Because factual impossibility is not a viable defense, defendants have argued that their defense is premised on legal impossibility, whereas the prosecutors have argued that the defense is premised on factual impossibility.

Almost all courts,[7] federal and state, have found that where a defendant was communicating with an undercover officer, the argument of impossibility is based on factual impossibility and is an improper argument.[8] This is based on the determination that the defendant unquestionably intended to engage in the conduct proscribed by law but failed only because of circumstances unknown to him.[9] Courts have determined that although the defendant could not have engaged in sexual conduct with an actual minor child, the defense of impossibility cannot apply because the defendant had every intention of engaging in such conduct, and it is only because the defendant was communicating with an undercover officer rather than an actual minor that the crime was not committed. Therefore, it is extremely unlikely that the defense of impossibility will survive judicial scrutiny and analysis.

Defense #2:
Outrageous Government Conduct/Entrapment

The defenses of outrageous government conduct and entrapment are similar and have been used in similar contexts but have important distinctions. For entrapment, the defendant must establish by a preponderance of the evidence that the government induced him to commit the offense charged.[10] The term inducement refers to government conduct that persuades one person to turn "from a righteous path to an iniquitous one"; neither mere solicitation nor the creation of opportunities to commit an offense is sufficient to prove inducement.[11] On the other hand, outrageous government conduct refers to government actions that are so outrageous as to violate due process.[12] The court will look at the totality of the circumstances in evaluating two factors: (1) government creation of the crime, and (2) substantial coercion.[13] Whereas the entrapment defense focuses upon the predisposition of the defendant to commit the crime, the outrageous governmental conduct defense focuses upon the government's conduct.[14]

In the case of *Marreel v. State*, the defendant argued that the undercover police officer entrapped him by posing as a 15-year old girl, claiming that "she" initiated several of the conversations, prodded for a sexual relationship in later conversations, and induced the defendant to speak about potential sexual conduct between himself and the "girl."[15] The court rejected this argument on the basis that the defendant made initial contact with the undercover, who immediately told the defendant "she" was 15, and the defendant chose to continue to engage "her" in the idea of having an affair involving sexual contact. Therefore, when the later conversations occurred, the defendant had already demonstrated his predisposition to commit the offense, and by that time, the undercover was merely trying to arrange a convenient opportunity to make the arrest.[16] The court ultimately determined that the undercover merely created an opportunity for the defendant to attempt to lure or entice a minor to participate in sexual activities, and that no coercive tactics or "arm-twisting" were utilized.[17]

In another case, the defendant claimed that the undercover officer engaged in outrageous government conduct where the police placed the persona of "Missy," a 14-year old girl in an internet chat room.[18] In applying the two prongs articulated above, the court determined that the officer neither created the crime, nor was his conduct coercive.[19] The officer did not initiate any of the sexually explicit messages, rather merely responded to the questions and ideas that were repeatedly proposed by the defendant.[20] Therefore, the court determined the government did not engage in outrageous conduct.

Defense #3:
Wiretap Defense

The wiretap defense is a unique defense that challenges the admission of the defendant's instant message (IM) conversations with the undercover into evidence, arguing that the messages were improperly recorded without the defendant's consent in violation of the wiretap statute. The court in *New Hampshire v. Lott* determined that the only issues under this defense were whether the officer's action constituted an interception of the defendant's communications, and if so, whether that interception occurred without the defendant's consent.[21] The court found that there was an interception, although as a matter of law, the

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defendant consented to the recording of his messages by the inherent nature of instant messaging.[22] The court concluded that the defendant implicitly consented to the recording of the communication and there was no violation of the wiretap statute.[23]

Challenge to the Sex Offender Registration Requirement

Many states have classified electronic luring crimes against minors as offenses requiring offenders to register as sex offenders. Many defendants who have been apprehended and convicted as a result of proactive investigations involving undercover police officers have challenged the registration requirement on the basis that they did not commit a crime against an actual minor.[24] Defendants have argued that because they communicated with a police officer rather than an actual minor, in a plain reading of the statute,[25] they should not be required to register.[26] Although each state's registration statute varies to some degree, courts have all agreed that when a defendant's intent was to solicit sex with a minor, it would be contrary to clear legislative intent to hold the defendant exempt from the sex offender registration requirement.[27]

Other defendants have challenged the registration requirement by arguing that the combined effects of the "registration" and "notification" provisions of the statute are punitive and violate the due process and double jeopardy provisions of the federal and state constitutions.[28] In *North Dakota v. Backlund,* the defendant argued that he was denied due process of law in the form of a meaningful opportunity to demonstrate that he is neither dangerous nor likely to re-offend, and, therefore, should be exempted from registration altogether.[29] The court rejected this argument by stating that his criminal conviction effectively provided him with procedural due process.[30] The defendant also argued that the registration and dissemination requirements were an additional punishment triggering double jeopardy. The court acknowledged that while the conditions may be harsh, they are prescribed by the sentencing scheme as part and parcel of the conviction for the offense of luring a minor.[31] As such, there was no violation of due process or double jeopardy and the registration requirement was upheld.

Conclusion

Undercover sting operations are a widely accepted tool used by law enforcement to apprehend and prosecute criminals. Courts have been steadfast in upholding the validity of such tactics in the quest to protect children from online predators. The case law demonstrates the courts' desire to protect law enforcement's right to conduct proactive investigations in an effort to pursue justice for our most precious and vulnerable population: children.

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1 Staff Attorney, APRI's National Center for Prosecution of Child Abuse.

2 Danica Szarvas-Kidd, *Electronic Luring Statutes Under Fire, Part I: How the Courts Have Responded to Constitutional Challenges to Electronic Luring Statutes (Part I of II),* APRI's Child Sexual Exploitation Update (forthcoming 2006); *see also* Danica Szarvas-Kidd, *The Evolution of Electronic Luring Statutes: Current and Future Trends*, 2:2 APRI's Child Sexual Exploitation Update (2005).

3 This defense refers exclusively to cases in which the defendant communicated with an undercover police officer who posed as a minor.

4 U.S. v. Spurlock, 386 F. Supp. 2d 1072, 1081 (W.D.Mo. 2005) (citing U.S.v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978)).

5 United States v. Contreras, 950 F2d 232, 237 (5th Cir. 1991), *cert. denied*, 504 U.S. 941 (1992).

6 *Spurlock*, 386 F. Supp. 2d at 1081 (citing U.S.v. Frazier, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978)).

7 Only one court has held that this defense qualifies as legal impossibility, thus requiring an actual victim. *See* U.S. v. Helder, No. 05-00125-01-CR-W-DW (W.D. Mo. Aug. 5, 2005). However, all other federal courts and state courts have rejected this interpretation, including the Court of Appeals for the Eighth Circuit, where *Helder* is pending on appeal. *See,* U.S. v. Blazek, 431 F. 3d 1104, 1107 (8th Cir. Iowa, 2005) (finding that a defense premised on *Helder* is unpersuasive because it is inconsistent with the 8th Circuit's decision in U.S. v. Patten, 397 F.3d 1100 (8th Cir. 2005)). *See also* U.S. v. Candiano, No. 2:05-CR-54PS (N.D.Ind. Jan. 30, 2006) (criticizing the *Helder* court's reasoning as unpersuasive); *see also* U.S. v. Tykarsky, No. 04-4092 (3rd Cir. May 10, 2006) (examining the legislative purpose and history of the statute to find that the *Helder* court based its decision on an incorrect deduction of Congressional intent).

8 *See, e.g., Tykarsky*, No. 04-4092 at 25 (joining the Courts of Appeals for the Fifth, Ninth, Tenth, and Eleventh Circuits in concluding that a conviction does not require the involvement of an actual minor).

9 *Id.*

10 *See* Marreel v. State, 841 So. 2d 600, 603 (Fla. Ct. App. 2003) (finding that where the defendant failed to prove that he was induced or lured into a sexual conversation or that he was not predisposed to this kind of activity, the court does not support a determination of entrapment).

11 *See id.* (citing U.S. v. Gifford, 17 F.3d 462, 468 (1st Cir. 1994), which found that inducement entails some semblance of "arm-twisting," pleading, or coercive tactics).

12 *See* Ohio v. Bolden, 2004 Ohio 2315, P14 (Ohio Ct. App. 2004) (finding that defendants have attempted unsuccessfully to raise an outrageous government conduct defense based on government sting operations).

13 *See id.* at P17 (citing State v. Cunningham, 808 N.E.2d 488, at P12 (Ohio Ct. App. 2004)).

14 *See id.* at P15 (describing the difference between entrapment and outrageous government conduct).

15 *See Marreel*, 841 So. 2d at 603 (finding that neither solicitation nor the creation of opportunities to commit an offense comprises inducement).

16 *Id.*

17 *Id.*

18 *Bolden,* 2004 Ohio at P18 (analogizing this case to the traditional solicitation case where a 'john' solicits sex from an undercover officer posing as a prostitute on a street corner, which does not mean that a crime was created by the officer).

19 *Id.*at P19-20.

20 *Id.* at P20.

21 *See* New Hampshire v. Lott, 879 A.2d 1167 (N.H. 2005) (finding that under N.H.'s wiretap statute, the interception of communication shall not be unlawful if it was intercepted with the consent of all parties to the communication).

22 *See id.* at 1170 (finding that persons using IM are aware that their conversations are recorded as an inherent function of this form of communication).

23 *Id.* at 1172.

24 *See, e.g.,* Colbert v. Virginia, 624 S.E.2d 108 (Va. Ct. App. 2006) (restating the defendant's argument that the trial court erred by imposing the registration requirement because his solicitations were not directed to an actual minor).

25 *See* Spivey v. Georgia, 619 S.E.2d 346, 348 (Ga. Ct. App. 2005) (finding that where the literal text of a statute is plain and does not lead to absurd or impractical consequences, the court must apply the statute as written without further inquiry).

26 *See, e.g.,* Colbert v. Virginia, 624 S.E.2d 108 (Va. Ct. App. 2006) (arguing that based on the plain meaning of the statute's language, there had to be an actual minor victim in order for the registration to have applied to him [defendant] upon his conviction).

27 *See id.* (citing to two other states, Georgia (Spivey v. State, 619 S.E. 2d 346 (Ga. App. 2005)) and Michigan (Michigan v. Meyers, 649 N.W.3d 123 (Mich. App. 2002), which have addressed this identical issue and have come up with the identical conclusion upholding the registration requirement).

28 *See* North Dakota v. Backlund, 672 N.W.2d 431, 443 (N.D. 2003) (stating that because Backlund pled guilty to a felony charge violating N.D.C.C. § 12.1-20-05.1, he is automatically subject to mandatory registration for 10 years).

29 *Id.* at P35.

30 *See id.* (finding that because the defendant did not raise a substantive due process argument in the trial court, the court would not address the merits of the argument that his substantive due process rights had been violated).

31 *See id* at P42 (concluding that the ramifications of registration and dissemination requirements are within the legislative prerogative).

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American Prosecutors Research Institute
National Center for Prosecution of Child Abuse
99 Canal Center Plaza, Suite 510
Alexandria, Virginia 22314
www.ndaa-apri.org