

OF OUTLAWS AND OFFLOADS: A CASE FOR DERIVATIVE ENTRAPMENT

Consider the following scenario.¹ Federal law enforcement agents ("Feds") conduct separate investigations of two Florida chapters of the Outlaw Motorcycle Club ("Outlaws"): the Daytona chapter and the Tampa chapter.² In Daytona, the Feds recruit a confidential informant ("CI") within the local chapter.³ As the CI observes and records, the leader of the chapter ("DK") directs its members to bomb the headquarters of a rival motorcycle gang and to raid another gang's clubhouse.⁴ Shortly thereafter, the Feds arrest the members of the Daytona chapter.⁵

In Tampa, an undercover agent infiltrates the local chapter.⁶ The Feds come to realize, however, that, with the exception of one member ("Hopper"), the five members of the Tampa chapter engage in crimi-

¹ This Note borrows its opening scenario from the recent trial of 16 members and associates of the Outlaw Motorcycle Club in the Tampa Division of the United States District Court for the Middle District of Florida. See *Case at a Glance*, NAT'L L.J., May 15, 1995, at A10.

² The Outlaw Motorcycle Club migrated from the Midwest to Florida in 1967. Bruce Vielmetti, *FBI Agent Describes History of Outlaw Gang*, ST. PETERSBURG TIMES, May 5, 1995, at B3. By the late 1970s Florida had become the seat of its operations, although it maintained chapters in 12 other states. *Id.* Besides road trips to other chapters, these operations reputedly included kidnapping women and coercing them into nude dancing and prostitution. *Id.*; see David Sommer, *Woman Testifies Biker Beat, Protected Her*, TAMPA TRIB., May 31, 1995, at 5; Bruce Vielmetti, *Outlaw's "Old Lady" Testifies: I Had No Way Out*, ST. PETERSBURG TIMES, May 24, 1995, at B1.

In the 1980s, federal law enforcement focused its sights upon the Florida chapters of the Outlaw Motorcycle Club, bringing two major prosecutions against them. Bruce Vielmetti, *U.S. Paints Dark Picture of Outlaws*, ST. PETERSBURG TIMES, Apr. 25, 1995, at B1. In 1992, federal authorities in the Federal Bureau of Investigation ("FBI"), the U.S. Drug Enforcement Administration ("DEA") and the Bureau of Alcohol, Tobacco and Firearms ("ATF") teamed with state law enforcement to initiate "Operation Shovelhead" (a "shovelhead" being a type of motorcycle engine), an investigation of the Outlaws in Tampa and St. Petersburg. David Sommer, *Jabs Traded at Closing of Outlaw Case*, TAMPA TRIB., Aug. 11, 1995, at 1 [hereinafter *Jabs Traded*]; Bruce Vielmetti, *Outlaws' Lawyers Fault Government*, ST. PETERSBURG TIMES, Aug. 9, 1995, at B3 [hereinafter *Outlaws' Lawyers*]. This undercover investigation operated separately from another federal investigation of Outlaws in Daytona that started subsequently, although the United States Attorney's office combined the two, after the fact, into a single indictment. See *Jabs Traded*, *supra*.

³ See David Sommer, *Informant Describes "Ambush" of Bikers*, TAMPA TRIB., May 9, 1995, at 6 [hereinafter *Informant*].

⁴ See Pat LaMec & Jim Leusner, *Agents Raid Outlaws Clubhouse*, ORLANDO SENTINEL, Mar. 1, 1995, at C1; *Informant*, *supra* note 3, at 6; Bruce Vielmetti, *Prosecution Rests in Outlaw Club Trial*, ST. PETERSBURG TIMES, Aug. 8, 1995, at B1 [hereinafter *Prosecution*].

⁵ See LaMec and Leusner, *supra* note 4.

⁶ See David Sommer, *Outlaws Were in Shambles, Says Leader*, TAMPA TRIB., at 6 [hereinafter *Shambles*].

nal activity only sporadically, if at all.⁷ In order to salvage the investigation, the Feds decide to institute a reverse sting in which the undercover agent will pay each Tampa Outlaw \$1000 to offload bricks of cocaine and bales of marijuana from a plane.⁸ The undercover agent suggests the idea to Hopper and lobbies him to recruit the other four Tampa Outlaws, insisting that the operation requires five men.⁹ Hopper communicates the \$1000 offer to his "brothers," and two sign on.¹⁰ Anxious to get the two more required of him, Hopper calls the St. Petersburg chapter and enhances the offer, promising that each St. Petersburg Outlaw at the offload will receive \$1200.¹¹ Two agree, and a week later, Hopper, two Tampa Outlaws and two St. Petersburg Outlaws travel to a designated hanger.¹² They offload bales of marijuana and bricks of ersatz cocaine (plaster of Paris) interspersed with actual cocaine, all requisitioned from an FBI warehouse, while a surveillance camera records the entire event.¹³ Later, the Feds arrest all five.

This motley investigation demonstrates three examples of a third party persuading defendants to break the law. In Daytona, DK persuaded the other chapter members to either raid or bomb rival clubhouses, or both; in St. Petersburg, Hopper persuaded the St. Petersburg Outlaws to join the Tampa offload; and in Tampa, the undercover agent importuned Hopper to solicit the Tampa Outlaws to offload drugs. Because the CI in Daytona had no part in originating these crimes, no court would allow the Daytona Outlaws to plead entrapment as a defense.¹⁴ Nor would many courts allow the St. Petersburg Outlaws to plead entrapment; although the Feds originated the scheme, they

⁷ See Jeff Stidham, *Feds Seduced Outlaw Gang, Defense Says*, TAMPA TRIB., July 13, 1995, at 3; *Outlaws' Lawyers*, *supra* note 2.

⁸ See *Shambles*, *supra* note 6; *Outlaws' Lawyers*, *supra* note 2; *Prosecution*, *supra* note 4.

⁹ See *Outlaws' Lawyers*, *supra* note 2.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See *United States v. Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992) (repudiating notion of "private" entrapment—entrapment, not by government agent, but by private individual), *cert. denied*, 507 U.S. 1022 (1993); *United States v. Sarmiento*, 786 F.2d 665, 668 (5th Cir. 1986) (same); *United States v. Leroux*, 738 F.2d 943, 947 (8th Cir. 1984) (citing clear majority rule in federal courts that entrapment defense does not extend to inducements by private citizen); see also *United States v. Beverly*, 723 F.2d 11, 12 (3d Cir. 1983); *United States v. Shapiro*, 669 F.2d 593, 597-98 (9th Cir. 1982); *United States v. Dove*, 629 F.2d 325, 329 (4th Cir. 1980); *United States v. Burkley*, 591 F.2d 903, 911 n. 15 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979).

did not have the St. Petersburg Outlaws in mind, and they did not authorize the enhanced payment.¹⁵

The most troubling scenario probably involves the two other Tampa Outlaws. There, the Feds specifically targeted them and specifically authorized the terms of the inducement. Hopper merely communicated the inducement to them. Yet in most circuits, of all the Tampa Outlaws lured to the hanger by the promise of a \$1000 pay day, only Hopper could raise a defense of entrapment.¹⁶

At a time when law enforcement demonstrates an escalating proclivity for the use of informants, undercover operations and "stings," one can hardly help but question the fairness of allowing law enforcement to insulate itself from entrapment defenses by employing unsuspecting middlemen.¹⁷ The difficulty inheres in elaborating a standard that would distinguish between defendants like the Tampa Outlaws—whom the Feds targeted and whose inducement the Feds created—and those like the St. Petersburg Outlaws—whose involvement the Feds

¹⁵ See, e.g., *United States v. Gonzales*, 461 F.2d 1000, 1001 (9th Cir.) (repudiating "vicarious" entrapment), *cert. denied*, 409 U.S. 914 (1972). According to the *Gonzales* court, "a defendant may not seek shelter under the defense of entrapment claimed by another." *Id.*

¹⁶ PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 317-18 (1989). In his examination of the prevailing law of entrapment, Marcus concludes:

In the vast majority of jurisdictions, whether applying objective or subjective tests, a strict standing hurdle must be crossed before the entrapment defense can be raised. Many courts have flatly declared that they "do not recognize a concept of derivative entrapment." The problem arises, of course, because of cases involving multiple defendants where the government agent who arguably engages in undue inducement directs those activities only against one or two of the defendants.

Id. In the actual Outlaws case, the Eleventh Circuit precedents established just such a unilateral repudiation of third party entrapment and thus constrained the district court from allowing many of the defendants to raise entrapment defenses. E.g., *United States v. Ambrose*, 707 F.2d 1209, 1212-13 (11th Cir.), *cert. denied*, 464 U.S. 986 (1983); *United States v. Mers*, 701 F.2d 1321, 1340 (11th Cir.), *cert. denied*, 464 U.S. 991 (1983). Once the trial went to the jury, the issue of entrapment resurfaced; three times during deliberations, the jury questioned whether the entrapment defense extended to defendants other than those whom the government had induced directly. Bruce Vielmetti, *Outlaws' Jurors Ask Questions*, ST. PETERSBURG TIMES, Aug. 23, 1995, at B3. The jury's resentment over the Eleventh Circuit's blanket prohibition against third party entrapment nearly resulted in a mistrial. David Sommer, *Outlaw Biker Gang Mistrial Averted*, TAMPA TRIB., Aug. 23, 1995, at 1. Ultimately, however, the jury returned verdicts against 14 of the 16 defendants. Bruce Vielmetti, *Some Outlaws Found Guilty; Two Acquitted*, ST. PETERSBURG TIMES, Aug. 30, 1995, at B1. Afterwards, a number of jurors complained of being hamstrung by the applicable law and voiced resentment over the methods employed by the Feds during the investigation. *Jurors Say Good Guys Just as Bad as Outlaws*, ORLANDO SENTINEL, Sept. 2, 1995, at D1.

¹⁷ For an entertaining documentary on the proliferation of sting operations and popular resentment against them, see *The Sting*, (A&E television broadcast, Nov. 23, 1994) (tracing development of "stings," from prohibition through ABSCAM to present).

never envisioned in the first place. The emergent theory of "derivative" entrapment does just this.¹⁸

This Note attempts to contextualize, clarify and ultimately advocate a derivative entrapment defense that would make itself available to defendants like the Tampa Outlaws while drawing a line at defendants like the St. Petersburg and Daytona Outlaws. Section I of this Note provides background on the history, sources and logic of the entrapment defense.¹⁹ Section II examines the case law that has met and struggled with issues of third party entrapment.²⁰ Section III discusses the 1995 decision in *United States v. Hollingsworth* by the United States Court of Appeals for the Seventh Circuit and suggests that its holding may do more harm than good to the case for a derivative entrapment defense.²¹ Finally, Section IV distills from the cases a standard for derivative entrapment and argues that, so structured, the defense remains consistent with the traditional logic and purposes of the entrapment defense.²²

I. THE ENTRAPMENT DEFENSE

The defense of entrapment does not arise from the Constitution or the constitutional rights of the defendant.²³ Rather, the Supreme

¹⁸ As this Note defines it, "derivative entrapment" comes into play when the government targets a distant defendant and transmits inducements for that person to commit a crime through an unwitting middleman. See *infra* notes 167-86 and accompanying text.

¹⁹ See *infra* notes 26-58 and accompanying text.

²⁰ See *infra* notes 59-142 and accompanying text.

²¹ See *United States v. Hollingsworth* 27 F.3d 1196, 1204 (7th Cir. 1994) (en banc) (Posner, J.) [hereinafter *Hollingsworth II*]; see *infra* notes 143-64 and accompanying text.

²² See *infra* notes 165-202 and accompanying text.

²³ *United States v. Russell*, 411 U.S. 423, 430-31 (1973). In *Russell*, the Court rejected a substantive Due Process theory of entrapment, distinguishing between the federal entrapment defense and the exclusionary remedies constitutionalized in *Miranda v. Arizona* and *Mapp v. Ohio* insofar as the defendant raising an entrapment defense had suffered no violation of a constitutional right. *Id.* (citing *Miranda*, 384 U.S. 436 (1966) and *Mapp*, 367 U.S. 643 (1961)). The *Russell* Court conceded, however, that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. In *Hampton v. United States*, a majority of justices agreed, although Justice Powell cautioned that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar convictions." 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring). These dicta acted as the fountainhead for a constitutional affirmative defense, similar to, but distinct from, entrapment. See *Hampton*, 425 U.S. at 489-90. Where the Court's entrapment decisions look to "federal common law," this emergent defense of "Government Misconduct" invokes constitutional Due Process rights. See, e.g., *Mathews v. United States*, 485 U.S. 58, 67 (1988) (Brennan, J., concurring); *Hampton*, 425 U.S. at 489-90. And unlike entrapment, the Government Misconduct defense may be decided by the court as a matter of law according to a

Court of the United States has fashioned the entrapment defense out of its authority to define federal procedure.²⁴ Thus, Congress may modify the entrapment defense at any time or do away with it altogether.²⁵ Likewise, the states may create their own versions of the defense, revise them or elaborate upon them.²⁶

The Court first recognized the entrapment defense in 1932, in *Sorrells v. United States*.²⁷ In *Sorrells*, an undercover prohibition agent repeatedly solicited the defendant to secure a gallon of whiskey as a favor to a fellow veteran.²⁸ In holding that the agent had entrapped the defendant "as a matter of law," the Supreme Court considered it determinative that the defendant had evinced no predisposition to commit such a crime.²⁹ The *Sorrells* Court's entrapment analysis thus focused on the subjective disposition of the defendant and asked whether that person was "engaged in criminal enterprises" (and therefore ineligible to raise the defense) or whether the individual was "an inno-

totality of the circumstances test. See, e.g., *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982). Perhaps because of this, the Government Misconduct defense has gained a certain caché among defense lawyers, especially on appeal. See *United States v. Tucker*, 28 F.3d 1420, 1423 (6th Cir. 1994) (noting that *Russell* "dicta" has inspired over 200 Government Misconduct defenses), cert. denied, 115 S. Ct. 1426 (1995). Despite this caché, however, the Government Misconduct defense has remained a distinctly difficult row for defendants to hoe. See, e.g., *id.* at 1425, 1428 (observing that only one appellate court has barred prosecution on basis of government misconduct); see also *United States v. Santana*, 6 F.3d 1, 3 (1st Cir. 1993) (deriding government misconduct defense as "death bed child of objective entrapment, a doctrine long since discarded in federal courts"). But cf. *Rochin v. California*, 342 U.S. 165 (1952) (holding that forced stomach-pumping of defendant violated Due Process Clause of Fourteenth Amendment).

²⁴ See *Sherman v. United States*, 356 U.S. 369, 380-81 (1957) (Frankfurter, J., concurring in the judgment).

²⁵ *Russell*, 411 U.S. at 433 ("Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable.").

²⁶ Twenty-five states and Puerto Rico have enacted their own statutory versions of the entrapment defense. See ALA. CODE § 13A-3-31 (1995); ALASKA STAT. § 11.81.450 (1995); ARK. CODE ANN. § 5-2-209 (Michie 1995); COLO. REV. STAT. § 18-1-709 (1995); CONN. GEN. STAT. § 53a-15 (1994); DEL. CODE ANN. tit. 11, § 432 (1995); GA. CODE ANN. § 16-3-25 (1995); HAW. REV. STAT. § 702-237 (1995); ILL. ANN. STAT. ch. 720, para. 7-12 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-3-9 (Burns 1995); KAN. STAT. ANN. § 21-3210 (1995); KY. REV. STAT. ANN. § 505.010 (Michie/Bobbs-Merrill 1995); MO. REV. STAT. § 562.066 (1994); MONT. CODE ANN. § 45-2-213 (1995); N.H. REV. STAT. ANN. § 626:5 (1994); N.J. REV. STAT. § 2C:2-12 (1994); N.Y. PENAL LAW § 40.05 (Consol. 1995); N.D. CENT. CODE § 12.1-05-11 (1995); OR. REV. STAT. § 161.275 (1994); 18 PA. CONS. STAT. § 313 (1995); TENN. CODE ANN. § 39-11-505 (1995); TEX. PENAL CODE ANN. § 8.06 (West 1996); UTAH CODE ANN. § 76-2-303 (1995); WASH. REV. CODE § 9A.16.070 (1995); P.R. LAWS ANN. tit. 33, § 3094 (1991).

²⁷ 287 U.S. 435, 437 (1932).

²⁸ *Id.* at 439-40.

²⁹ *Id.* at 441, 452.

cent person."³⁰ In dissent, Justice Roberts bridled at the notion that government conduct may escape constitutional censure with regards to one defendant but not with regards to another.³¹ His dissent has served as the progenitor of a line of separate opinions urging an "objective" standard for entrapment, one that focuses solely on the government's conduct.³²

In 1958, in *Sherman v. United States*, the Supreme Court returned to the entrapment defense.³³ In *Sherman*, the government's informant importuned the defendant for drugs several times after an initial meeting in a doctor's office where they both were seeking treatment for drug addiction.³⁴ Ultimately, the defendant capitulated, although he sold the narcotics to the government informant for cost.³⁵ On appeal, Judge Learned Hand of the Second Circuit Court of Appeals reversed the conviction of the defendant, setting forth what has become the classic, bipartite entrapment analysis:

(1) did the agent induce the accused to commit the offence charged in the indictment;

(2) if so, was the accused ready and willing without permission and was he awaiting any propitious opportunity to commit the offense.

On the first question the accused has the burden; on the second question the prosecution has it.³⁶

In affirming the Second Circuit's decision and holding that the defendant in *Sherman* had been entrapped as "a matter of law," the United States Supreme Court also reaffirmed the second prong of this analysis—the inquiry into the defendant's *predisposition*—emphasizing that the gravamen of the entrapment defense is to pro-

³⁰ *Id.* at 441–42.

³¹ *Id.* at 458–59 (Roberts, J., dissenting). Justice Roberts wrote:

Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the basis for the reason for refusing the processes of the court to consummate an abhorrent transaction.

Id. (Roberts, J., dissenting).

³² See, e.g., *Hampton*, 425 U.S. at 496–97; *Russell*, 411 U.S. at 437–38 (Douglas, J., dissenting); *Sherman*, 356 U.S. at 379–83; *Sorrells*, 287 U.S. at 441–42 (Stewart, J., dissenting).

³³ 356 U.S. at 369.

³⁴ *Id.* at 371.

³⁵ *Id.*

³⁶ *United States v. Sherman*, 200 F.2d 880, 882–83 (2d Cir. 1952) (L. Hand, J.), *aff'd*, 356 U.S. 369 (1957).

hibit the government from laying a trap for the "unwary innocent," while still allowing it to lay one for the "unwary criminal."³⁷ Again, however, a portion of the Court favored a more "objective" approach, one that truncated the analysis at the first, "inducement" prong, eschewing an inquiry into the defendant's predisposition.³⁸

In a pair of decisions in the 1970s, the Supreme Court resisted expanding the entrapment defense further, preferring to leave the entrapment defense to juries.³⁹ In 1973, in *United States v. Russell*, the Supreme Court held that the government had not entrapped a defendant as "a matter of law" despite the fact that it had supplied him with the essential ingredient to manufacture narcotics.⁴⁰ In a 5-4 decision, the Court emphasized that entrapment should be a matter for juries to decide, not another weapon for judges looking to check law enforcement.⁴¹ Once again, though, a minority of the Court favored an "objective" approach, insisting that the trial judge should rule on an entrapment defense "as a matter of law," and that the judge should focus exclusively on the government's conduct.⁴²

In 1976, in *Hampton v. United States*, the United States Supreme Court held that, even where the government furnished all the narcotics in the transaction, a defendant convicted for trafficking in heroin was not entitled to an entrapment defense so long as he was predisposed to commit the crime.⁴³ Despite the active role the government had played in the operation, the Court concluded that the jury could have found the defendant predisposed to commit the crime.⁴⁴ Yet again, however, a four-member minority of the Court rejected the majority's "subjective" version of the defense in favor of an "objective" version of

³⁷ 356 U.S. at 372.

³⁸ See *id.* at 382-83 (Frankfurter, J., concurring in the judgment). Justice Frankfurter wrote: No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . . . Permissible police activity does not vary according to the particular defendant concerned Past crimes do not forever outlaw the criminal and open him to police practices . . . from which the ordinary citizen is protected.

Id. (Frankfurter, J., concurring in the judgment).

³⁹ See *Hampton*, 425 U.S. at 490; *Russell*, 411 U.S. at 436.

⁴⁰ 411 U.S. at 425, 436.

⁴¹ *Id.* at 435.

⁴² *Id.* at 436 (Brennan, J., dissenting) (siding with "objective" theories of Justices Roberts and Frankfurter); *id.* at 441 (Stewart, J., dissenting) ("[T]his objective approach to entrapment advanced by the Roberts opinion in *Sorrells* and the Frankfurter opinion in *Sherman* is the only one truly consistent with the underlying rationale of the defense.").

⁴³ 425 U.S. at 485, 490-91.

⁴⁴ *Id.* at 489-90.

entrapment, focusing solely on the (mis)conduct of the government, as decided by the judge, not the jury.⁴⁵

In 1988, in *Mathews v. United States*, the Supreme Court held that a defendant could raise the seemingly inconsistent defenses of innocence and entrapment.⁴⁶ In his capacity as an official at the municipal Small Business Administration, the defendant in *Mathews* accepted loans from a cooperating individual.⁴⁷ Because the defendant refused to admit all elements of the charge, the trial judge denied his motion to raise an entrapment defense.⁴⁸ Drawing an analogy to Rule 8(e)(2) of the Federal Rules of Civil Procedure, which allows civil defendants to raise inconsistent defenses, the Supreme Court concluded that a criminal defendant could raise an entrapment defense without admitting the elements of the crime.⁴⁹ Notably, in a concurring opinion, the decades-long proponent of the objective theory of entrapment, Justice Brennan, seemed to put the objective-subjective controversy to rest: "Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate. The Court has spoken definitively on this point."⁵⁰

The Supreme Court's most recent exposition of the entrapment defense came in 1992, in *Jacobson v. United States*, when the Court held that, by soliciting the defendant to buy child pornography over a two-year period, the government had entrapped him as a matter of law.⁵¹ The defendant in *Jacobson* was a Nebraska farmer in 1985 when federal law enforcement agencies singled him out for an undercover sting and indictment under the Child Protection Act through a mailing list.⁵² After two years of correspondence with various fictitious organizations ostensibly devoted to the appreciation of child pornography, the defendant placed an order.⁵³ Shortly thereafter, he was arrested and subsequently convicted, despite raising an entrapment defense.⁵⁴

⁴⁵ *Id.* at 497 (Brennan, J., dissenting). Justice Brennan explained that "[u]nder [an objective] approach, the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury." *Id.* (Brennan, J., dissenting) (quoting *Russell*, 411 U.S. at 441 (Brennan, J., dissenting)).

⁴⁶ 485 U.S. 58, 66 (1988).

⁴⁷ *Id.* at 60.

⁴⁸ *Id.* at 61.

⁴⁹ *Id.* at 64, 66.

⁵⁰ *Id.* at 67 (Brennan, J., concurring). Some states, however, continue to apply an "objective" version of entrapment. See, e.g., *People v. McIntire*, 591 P.2d 527, 528 (Cal. 1979).

⁵¹ 112 S. Ct. 1535, 1543 (1992).

⁵² *Id.* at 1537–40.

⁵³ *Id.* at 1539–40.

⁵⁴ *Id.*

The Supreme Court reversed the jury verdict, however, thereby resuscitating the doctrine of entrapment as a matter of law, which had remained dormant since the 1958 *Sherman* opinion.⁵⁵ Nonetheless, the *Jacobson* Court did not simultaneously resuscitate the objective version of entrapment; instead, it rested its analysis on the paucity of evidence suggesting that, prior to government involvement, the defendant had harbored the predisposition to engage in such criminal conduct.⁵⁶

The Supreme Court's entrapment decisions reveal that the Court is striving to remain true to the doctrine's impetus: that is, the judiciary's refusal to countenance government seduction of otherwise innocent citizens.⁵⁷ Although the Court has wavered on whether entrapment is solely a matter for the jury or whether it may be decided as a matter of law, it has steadfastly resisted adopting an "objective" theory of entrapment that would focus exclusively on the conduct of the government.⁵⁸ As the Supreme Court has defined it, the entrapment doctrine does not consider the government's conduct in a vacuum. Entrapment, rather, always situates that conduct relative to the particular defendant.

II. ENTRAPMENT BY A THIRD PARTY

As the predisposition prong ascended in importance in the Supreme Court's entrapment jurisprudence, the other prong of the entrapment analysis (the objective, or government inducement, prong) seemed to diminish to a near vestigial significance.⁵⁹ Nonetheless, the issue of inducement remains pivotal in defining whose inducements may result in entrapment and, thus, who may raise it as a defense.⁶⁰

⁵⁵ *Id.* at 1543 ("Rational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition . . . [T]he prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed . . . to violate the law[.]" (emphasis added)). In so doing, the Court gave the lie to the circuits that had, in the interim between *Sherman* and *Jacobson*, asserted that entrapment as a matter of law was effectively moribund. See, e.g., *United States v. Markovic*, 911 F.2d 613, 616 (11th Cir. 1990).

⁵⁶ *Jacobson*, 112 S. Ct. at 1541-42.

⁵⁷ See *Sorrels*, 287 U.S. at 441-42.

⁵⁸ E.g., *Jacobson*, 112 S. Ct. at 1541-42 (inquiring into defendant's predisposition to commit crime). Compare *Russell* 411 U.S. at 435 (suggesting that entrapment should go to jury) with *Jacobson*, 112 S. Ct. at 1543 (deciding entrapment as a matter of law).

⁵⁹ See, e.g., *United States v. Hollingsworth*, 9 F.3d 593, 597 (7th Cir. 1993) (Posner, J.) [hereinafter *Hollingsworth I*] ("The elements of inducement and predisposition have tended to merge. More precisely, inducement has tended to merge into predisposition, now often cited as the principal element of the defense."), *aff'd en banc*, 27 F.3d 1197 (1994); see also *United States v. Russell*, 411 U.S. 423, 433 (1973) (calling predisposition the "principal element" in entrapment defense).

⁶⁰ E.g., *United States v. Garcia*, 546 F.2d 613, 615 (5th Cir. 1977). The *Garcia* court conceded that predisposition is the "principal element" in the defense but maintained the importance of

The Supreme Court cases show that entrapment can occur through an undercover agent, a confidential informant or a private citizen knowingly acting under the direction of government agents.⁶¹

Less clear is when, if ever, entrapment can occur through a third party who is not knowingly furthering a government scheme.⁶² One can divide the cases that have dealt with the issue of entrapment through a third party into three variations upon the theme: (i) "private entrapment," in which one private individual, of his own will, induces the defendant to commit a crime; (ii) "vicarious entrapment," in which a private individual, himself induced by a government agent or official, induces the defendant to commit a crime; and (iii) "derivative entrapment" in which a private individual, acting as an "unsuspecting middleman," "transmits" the inducements offered him by a government agent or official in order to "net" the "distant defendant."⁶³

A. Private Entrapment

Returning to the Florida Outlaws, specifically the Daytona chapter, one might recall that their leader, DK, persuaded the rest to bomb a rival gang's clubhouse and to ambush another gang, and that the government's informant merely recorded their activities.⁶⁴ Were any of the Daytona Outlaws to raise an entrapment defense, they would be raising one of private entrapment: i.e., entrapment by a party wholly unrelated to the government.⁶⁵ As one would expect, the circuits have roundly and unanimously disallowed such a radical expansion of the

inducement insofar as "[t]he conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents." *Id.* (quoting *Lopez v. United States*, 373 U.S. 427, 434 (1963)).

⁶¹ See *Jacobson v. United States*, 112 S. Ct. 1535, 1538-40 (1992) (entrapment through undercover agent); *Mathews v. United States*, 485 U.S. 883, 885 (1988) (entrapment through private citizens under direction of agents); *Hampton v. United States*, 425 U.S. at 486-87 (1976) (same); *Russell*, 411 U.S. at 425 (entrapment through undercover agent); *Sherman v. United States*, 356 U.S. 369, 371 (1958) (entrapment through confidential informant); *Sorrels v. United States*, 287 U.S. 435, 439-40 (1932) (entrapment through undercover agent).

⁶² See *United States v. Manzella*, 791 F.2d 1263, 1269-70 (7th Cir. 1986).

⁶³ See *United States v. Hodges*, 936 F.2d 371, 372 (8th Cir. 1991) (describing derivative entrapment); *United States v. Pilarinos*, 864 F.2d 253, 256 (2d Cir. 1988) (same); *United States v. Valencia*, 645 F.2d 1158, 1168 (2d Cir. 1980) (depicting vicarious entrapment); *United States v. Garcia*, 546 F.2d 613, 615 (5th Cir.) (depicting private entrapment), *cert. denied*, 430 U.S. 958 (1977). Although a number of courts have used these terms interchangeably, others have increasingly recognized distinctions between them. Compare *United States v. Shapiro*, 669 F.2d 593, 597-98 (9th Cir. 1982) (using terms interchangeably) and *United States v. Leroux*, 738 F.2d 943, 947 (8th Cir. 1984) (same) with *Hollingsworth II*, 27 F.3d at 1204 (distinguishing between terms).

⁶⁴ See *supra* text accompanying notes 2-5.

⁶⁵ *E.g.*, *United States v. Burkley*, 591 F.2d 903, 911 n.15 (D.C. Cir. 1978).

entrapment defense.⁶⁶ This consensus draws on the realization that "[m]ost crimes are the result of an inducement of one sort or another; from Adam onward temptation has not been a per se excuse."⁶⁷ Or, as the Seventh Circuit has suggested, "[p]rivate entrapment is just another term for criminal solicitation, and outside the narrow haven created by the defense of necessity or compulsion, the person who yields to the solicitation and commits the solicited crime is guilty of that crime."⁶⁸

The decision of the United States Court of Appeals for the Fifth Circuit in the 1974 case of *United States v. Maddox* is paradigmatic.⁶⁹ In *Maddox*, the defendants entered into a "stolen-shirt" sting arranged by private investigators.⁷⁰ The defendants sought to raise an entrapment defense, despite the fact that the private investigators conducted the sting without police involvement.⁷¹ The *Maddox* court dismissed the defendants' proposed entrapment defense with the seemingly self-evident observation that "[t]he entrapment defense does not extend to inducement by private individuals."⁷²

B. Vicarious Entrapment

A more difficult question involves the plight of the St. Petersburg Outlaws.⁷³ The Feds created the opportunity for their criminal activity through the inducements offered to their Tampa cohorts; nonetheless, the Feds had no designs on the St. Petersburg Outlaws, and the inducement offered them by the unsuspecting middleman, Hopper, differed from the original inducement offered by the Feds.⁷⁴ A few courts, and at least one commentator, have concluded that defendants in the position of the St. Petersburg Outlaws can raise a defense of

⁶⁶ See, e.g., *United States v. Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992); *United States v. Sarmiento*, 786 F.2d 665, 667 (5th Cir. 1986); *Leroux*, 738 F.2d at 947; *United States v. Beverly*, 723 F.2d 11, 12 (3d Cir. 1983); *United States v. Shapiro*, 669 F.2d 593, 597-98 (4th Cir. 1980).

⁶⁷ *United States v. Bradley*, 820 F.2d 3, 6 (1st Cir. 1987).

⁶⁸ *Manzella*, 791 F.2d at 1269.

⁶⁹ 492 F.2d 104, 106 (5th Cir.), *cert. denied*, 419 U.S. 851 (1974).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *Manzella*, 791 F.2d at 1269-70. The *Manzella* court raised the question: "[S]hould the government's lack of control over persons who are not its agents be a complete defense to any effort to use the conduct of such a person as the basis for a defense of entrapment by someone with whom the government has not dealt directly?" *Id.*

⁷⁴ See *supra* text accompanying notes 6-13. The Second Circuit phrased this query more abstractly:

if A is a government agent who induces B and B gets C involved, and if C has no knowledge of the inducement of B by A or has never been introduced to A, can C

vicarious entrapment.⁷⁵ A great many more, however, have abjured the theory of vicarious entrapment as a procedural Pandora's box of unforeseen defendants and unintended crimes.⁷⁶

Those courts that have endorsed the vicarious entrapment defense have often focused on the fact that its absence leaves an "unwary innocent" defenseless.⁷⁷ In 1957, in *United States v. Klosterman*, the United States Court of Appeals for the Third Circuit held that an Internal Revenue Service ("IRS") agent had entrapped the defendant by inducing another IRS agent to persuade the defendant's insurance representative to involve the defendant in a bribery scheme.⁷⁸ The court concluded that the first IRS agent had entrapped the second, and the second had entrapped the insurance man.⁷⁹ Thus, the second agent acted as the first's unwitting agent in entrapping the insurance representative, and the insurance agent acted as the second's unwitting agent in entrapping an innocent person.⁸⁰ Accordingly, the *Klosterman* court concluded, the government had entrapped the defendant, albeit transitively.⁸¹

In 1980, in *United States v. Valencia*, the United States Court of Appeals for the Second Circuit held that a defendant may raise an entrapment defense, even when the government has not targeted him or contacted him directly.⁸² The defendant in *Valencia*, along with his wife, entered into an undercover drug buy.⁸³ Because only the defendant's wife had interacted directly with the government's agents, the

nevertheless argue entrapment on the ground that he would not have become involved *but for* the original inducement by A?

United States v. Valencia, 645 F.2d 1158, 1168 n.10 (2d Cir. 1980).

⁷⁵ *Valencia*, 645 F.2d at 1168; *United States v. Klosterman*, 248 F.2d 191, 196 (3d Cir. 1957); *Hassel v. Mathues*, 22 F.2d 979, 980 (E.D. Pa. 1927); Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122, 1129 (1982) ("[E]ven when the government has no reason to suspect that a target of an investigation will induce a nonessential collaborator to join in criminal activity, the third party should be able to plead entrapment if it is found that the initial target was himself entrapped.").

⁷⁶ *E.g., Martinez*, 979 F.2d at 1432; *United States v. Marren*, 890 F.2d 924, 931 (7th Cir. 1989); *United States v. Mers*, 701 F.2d 1321, 1340 (11th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Carbajal-Portillo v. United States*, 396 F.2d 944, 948 (9th Cir. 1968).

⁷⁷ See *Carbajal-Portillo*, 396 F.2d at 947 ("Thus we have the paradoxical situation in which the principal participant goes free because he was entrapped, while his lesser confederate must remain in prison and serve his sentence unless the 'umbrella' of [the principal's] entrapment is stretched to cover [the lesser] as well.").

⁷⁸ 248 F.2d 191, 193-94, 196 (3d Cir. 1957).

⁷⁹ *Id.* at 196.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 645 F.2d at 1168.

⁸³ *Id.* at 1161.

trial judge instructed the jury that the defendant could not raise an entrapment defense.⁸⁴ The Second Circuit, however, reversed the trial court, issuing a broad ruling:

If a person is brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which could amount to inducement, then that person should be able to avail himself of the defense of entrapment just as may the person who receives the inducement directly.⁸⁵

The *Valencia* court's holding ran counter to the prevailing rule among the circuits against allowing such a defense of vicarious entrapment.⁸⁶ Courts in the majority of circuits have pointed out that the entrapment defense does not turn solely on the defendant's innocence but also on the government's mendacity.⁸⁷ In other words, although vicarious entrapment may serve the purpose of the predisposition (or subjective) prong of the entrapment defense—protecting the “unwary innocent”—it ignores the purpose of the inducement (or objective) prong of the defense—discouraging certain *government* conduct.⁸⁸

Moreover, some courts have recognized practical dilemmas in expanding the entrapment defense to accommodate a vicarious entrapment doctrine.⁸⁹ First and foremost among them is the potential proliferation of entrapment defenses among defendants whom the

⁸⁴ *Id.* at 1163–64.

⁸⁵ *Id.* at 1168.

⁸⁶ *Id.* at 1174–75 (Van Graafeiland, J., concurring in part and dissenting in part) (collecting cases); see, e.g., *Marren*, 890 F.2d at 931 n.2; *United States v. Gonzales*, 461 F.2d 1000, 1001 (9th Cir.), cert. denied, 409 U.S. 914 (1972); see also *State v. Perez*, 438 So. 2d 436, 438 (Fla. Dist. Ct. App. 1983) (“If . . . *Valencia* is read to mean that a defendant has available to him an entrapment defense simply because another, himself entrapped, induced the defendant to commit the crime, then *Valencia* stands alone for this proposition and is of little help to [defendant] in light of the otherwise universal (and, in our view, correct) rejection of the vicarious entrapment defense.”).

⁸⁷ *Carbajal-Portillo*, 396 F.2d at 948.

⁸⁸ See *Martinez*, 979 F.2d at 1432. The *Martinez* court noted:

[T]he purpose behind the entrapment defense is to prohibit the government from directly involving an otherwise disinterested and disinclined person from committing a criminal offense. When the government has no contact with the accused, that purpose has no relevance; therefore, without direct government communication with the defendant, there is no basis for the entrapment defense.

Id.

⁸⁹ See, e.g., *United States v. Sarmiento*, 786 F.2d 665, 668 (5th Cir. 1986) (asserting that vicarious entrapment leads to “untenable rule that codefendants’ communications among each other concerning the government agents’ undercover scheme automatically raises the possibility of entrapment”).

government had never targeted in the first place.⁹⁰ One state court has noted an equally troubling dilemma—the possibility that a defendant may gain immunity for a crime that the government never envisioned.⁹¹

Perhaps out of wariness of both the theoretical and practical difficulties that attend vicarious entrapment, many circuit and state courts have adopted rigid, per se rules against any entrapment through a third party.⁹² In 1983, in *United States v. Beverly*, for instance, the United States Court of Appeals for the Third Circuit held that, where one defendant had brought the other into an arson scheme at the behest of an agent of the Bureau of Alcohol, Tobacco and Firearms (“ATF”), the second could not raise an entrapment defense.⁹³ In *Beverly*, a paid informant introduced the first defendant and another party to the ATF agent who proceeded to offer them \$3000 to burn down a building.⁹⁴ When the other party backed out of the scheme, the ATF agent asked the first defendant to find another partner.⁹⁵ After the first defendant brought in the second, the ATF agent supplied them with gasoline and drove them to a government-owned building, which they proceeded to set afire.⁹⁶ The *Beverly* court did not analyze the relationship between the ATF agent’s entreaties and the second defendant.⁹⁷ Instead, the court took it as self-evident that a defendant who had not been directly solicited by the government agent could not raise an entrapment defense.⁹⁸

⁹⁰ See *Hollingsworth I*, 9 F.3d at 602. The Seventh Circuit opined,

The concern with recognizing a defense of vicarious entrapment is that it would enormously complicate the trial of criminal cases. In any case in which a government undercover agent or informant had been used, defendants with whom he had not dealt face to face or even over the phone could argue with more or less plausibility that the real criminal with whom they had dealt had merely been transmitting the inducements furnished by the agent or informant.”; *Valencia*, 645 F.2d at 1179 (Van Graafeiland, J., dissenting from denial of en banc) (“If the panel opinion is now the law of this Circuit, a DEA agent who hereafter solicits the sale of drugs by one person may find to his surprise that he has entrapped a nationwide group of conspirators.

Id.

⁹¹ *People v. Vo Thanh Thoi*, 261 Cal. Rptr. 789, 792 (1989) (“[T]he defense must show at a minimum that the improper police practice yielded the charged crime. Otherwise, a defendant would have tantamount to a get-out-of-jail-free card for the first crime he commits after the improper police activity.”).

⁹² *E.g.*, *United States v. Ambrose*, 707 F.2d 1209, 1212–13 (11th Cir.), *cert. denied*, 464 U.S. 986 (1983).

⁹³ 723 F.2d 11, 12 (3d Cir. 1983) (per curiam).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *id.*

⁹⁸ *Beverly*, 723 F.2d at 12.

Similarly, in 1983, in *United States v. Mers*, the Eleventh Circuit Court of Appeals also employed a cut-and-dry approach to the issue of third party entrapment.⁹⁹ In *Mers*, a government informant approached the original suspect with a scheme to sell drugs.¹⁰⁰ That suspect eventually agreed, and he and his son engaged in a number of conversations with undercover agents to arrange it.¹⁰¹ Confronted with the question of whether the son could raise an entrapment defense, the Court cursorily noted that the son had been induced originally by his father and then pronounced, "[w]hile [the son's] vicarious entrapment theory is ingenious, it is not the law."¹⁰²

C. Derivative Entrapment

The thorniest bramble in this Note's opening scenario involves the Tampa Outlaws.¹⁰³ The government targeted each of them, but its agent only induced one directly, relying on him to communicate the inducement to the others.¹⁰⁴ In circuits or states whose courts have resorted to a blanket prohibition against any sort of third party entrapment, the Tampa Outlaws could not raise an entrapment defense.¹⁰⁵ An emergent strain of case law, however, would allow them to raise a defense of "derivative entrapment."¹⁰⁶

1. The Development of the Derivative Entrapment Defense in the Federal Courts

In 1980, in *United States v. Anderton*, the Fifth Circuit Court of Appeals held that a defendant who had been induced by the government through an unsuspecting middleman could nonetheless raise an entrapment defense.¹⁰⁷ The unsuspecting middleman in *Anderton* of-

⁹⁹ 701 F.2d 1321, 1340 (11th Cir.), *cert. denied*, 464 U.S. 991 (1983).

¹⁰⁰ *Id.* at 1324.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1340.

¹⁰³ *Manzella*, 791 F.2d at 1269. In dicta, the Seventh Circuit raised the question: "Could the government be allowed to do indirectly, through . . . an unwitting agent what it would not have been allowed to do in face-to-face dealings[?]" *Id.*

¹⁰⁴ See *supra* text accompanying notes 6-13.

¹⁰⁵ See, e.g., *United States v. Manarite*, 44 F.3d 1407, 1418 (9th Cir. 1995) ("This Circuit . . . does not recognize the theory of 'derivative entrapment.'").

¹⁰⁶ *United States v. Neal*, 990 F.2d 355, 358 (8th Cir. 1993); *United States v. Hodges*, 936 F.2d 371, 372 (8th Cir. 1991); *Pilarinos*, 864 F.2d at 255-56; *Bradley*, 820 F.2d at 7; *United States v. Anderton*, 629 F.2d 1044, 1047 (5th Cir. 1980); *United States v. Jannotti*, 501 F. Supp. 1182, 1202-03 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir. 1982), *aff'd*, 729 F.2d 213 (3d Cir. 1983) (en banc), *cert. denied*, 469 U.S. 880 (1984).

¹⁰⁷ 629 F.2d at 1045, 1047.

ferred a bribe to an IRS agent to use his influence to call off an investigation of his bookmaking operation.¹⁰⁸ Feigning corruption, the IRS agent accepted the bribe and then persuaded the middleman to involve the defendant, who had earned a gambling conviction some fifteen years earlier.¹⁰⁹ Noting that the Supreme Court had never limited the entrapment defense to those directly induced by government agents, the *Anderton* court concluded that the government had effectively entrapped the defendant through "an ignorant pawn."¹¹⁰

Later that year, in *United States v. Jannotti*, the United States District Court for the Eastern District of Pennsylvania entered a judgment notwithstanding the verdict, acquitting two defendants charged under the Racketeering Influenced and Corrupt Organizations Act ("RICO") on the ground that the evidence at trial established derivative entrapment as a matter of law.¹¹¹ The undercover operation in *Jannotti* stemmed from an investigation carried out by FBI agents to uncover official corruption in New Jersey.¹¹² The ruse involved the agents posing as representatives of a wealthy sheik who was exploring investment opportunities in America.¹¹³ Having garnered convictions in New Jersey, the FBI shifted the operation to Philadelphia.¹¹⁴ They brought along one of the targets of the earlier investigation, the mayor of Camden, who still labored under the delusion that he was dealing with a wealthy sheik.¹¹⁵ The FBI then convinced the mayor and a Philadelphia lawyer to make overtures on behalf of the "sheik" toward the defendants, two members of the Philadelphia City Council, offering them "consulting fees" in exchange for vague commitments to a casino proposal.¹¹⁶

In spite of the Government's insistence that the two city councilmen could not raise entrapment defenses, the *Jannotti* court concluded that something less than wholesale vicarious entrapment was at issue insofar as the government agents had selected the targets, inducements and (mis)representations of the unsuspecting middlemen.¹¹⁷

¹⁰⁸ *Id.* at 1045.

¹⁰⁹ *Id.* at 1045-46.

¹¹⁰ *Id.* at 1047.

¹¹¹ 501 F. Supp. at 1202-03, 1205. Although the *Jannotti* decision was later reversed, the Third Circuit did not rule on the district court's holding vis-à-vis derivative entrapment. See *Jannotti v. United States*, 729 F.2d 213, 225 (3d Cir. 1983) (en banc), cert. denied, 469 U.S. 880 (1984).

¹¹² *Jannotti*, 501 F. Supp. at 1193-99.

¹¹³ *Id.* at 1193.

¹¹⁴ *Id.* at 1195.

¹¹⁵ *Id.* at 1193, 1196.

¹¹⁶ *Id.* at 1195-99.

¹¹⁷ *Jannotti*, 501 F. Supp. at 1202.

Accordingly, the court held that, absent a showing of predisposition by the Government, the FBI had entrapped the city councilmen as a matter of law.¹¹⁸

In 1993, in *United States v. Neal*, the United States Court of Appeals for the Eighth Circuit used a similar analysis to hold that a defendant whom the government had not targeted in its undercover drug buy could not raise an entrapment defense after getting involved.¹¹⁹ In *Neal*, a government informant negotiated a drug buy with a suspect.¹²⁰ The suspect then called on the defendant to supply the drugs, which he did.¹²¹ In its conclusion that the government had not entrapped the defendant, the *Neal* court considered it dispositive that the government had not originally set its sights upon him.¹²² Had the government asked the suspect to involve the defendant in the drug buy, the *Neal* court suggested, the defendant could have raised an entrapment defense.¹²³

2. The Development of the Derivative Entrapment Defense in State Courts

In 1979, in *People v. McIntire*, the Supreme Court of California held that an undercover agent who had enjoyed no contact with the defendant had nonetheless entrapped her through her unsuspecting brother.¹²⁴ The government agent in *McIntire* was a local police officer who had been posing as a high school student.¹²⁵ Upon hearing that the defendant dealt drugs, the agent sought out the defendant's brother at school and began to pressure the brother to ask the defendant to supply him with some marijuana.¹²⁶

The *McIntire* court noted that if the blanket prohibition against entrapment through a third party were indeed the law, then the government could effectively evade the entrapment defense, achieving ends indirectly that it could not achieve directly.¹²⁷ By holding that the defendant could raise a derivative entrapment defense, the *McIntire* court rejected such tortured literalism and sent a message that

¹¹⁸ *Id.* at 1203.

¹¹⁹ 990 F.2d 355, 358 (8th Cir. 1993).

¹²⁰ *Id.* at 356-57.

¹²¹ *Id.*

¹²² *Id.* at 358.

¹²³ *See id.*

¹²⁴ 591 P.2d 527, 531 (Cal. 1979).

¹²⁵ *Id.* at 529.

¹²⁶ *Id.*

¹²⁷ *Id.* at 530.

"[i]mproper governmental instigation of crime is not immunized because it is effected indirectly through a pliable medium."¹²⁸

In 1986, in *Commonwealth v. Silva*, a Massachusetts Appeals Court held that the derivative entrapment defense did not extend to a defendant whom the government had not targeted and to whom the government's inducements had not flowed.¹²⁹ In *Silva*, the state police made the first defendant the subject of a narcotics investigation.¹³⁰ Undercover agents visited his bar and told him that they wanted to buy cocaine.¹³¹ The first defendant responded negatively but later referred them to the second defendant, a patron at the bar.¹³² The second defendant told the first to have them return the next day.¹³³ The agents did and again solicited the first defendant who again referred them to the second.¹³⁴ This time, the second defendant delivered the cocaine to the first who then delivered it to the agents.¹³⁵

The *Silva* court denied that the second defendant could raise a defense of derivative entrapment.¹³⁶ The court emphasized that the state police had no reason to believe that their investigation of the first defendant would involve the second.¹³⁷ The court also pointed out that the second defendant acted out of friendship toward the first, not as a response to the agents' inducement.¹³⁸ Nonetheless, the court explicitly avoided ruling against a derivative entrapment defense as a matter of law.¹³⁹ Rather, the *Silva* court set two conditions for a valid derivative entrapment defense: the government must have some designs on the distant defendant, and the middleman must communicate the government's inducement to him or her.¹⁴⁰

Increasingly, both federal and state courts have recognized the plausibility of allowing a narrow version of third party entrapment that would hold the state or federal government accountable when it purposefully transmits its inducements through an unwitting middleman to net a distant defendant.¹⁴¹ In so doing, these courts have dis-

¹²⁸ *Id.* at 530-31.

¹²⁹ 488 N.E.2d 34, 41-42 (Mass. App. Ct. 1986).

¹³⁰ *Id.* at 35.

¹³¹ *Id.*

¹³² *Id.* at 35-36.

¹³³ *Id.* at 36.

¹³⁴ *Silva*, 488 N.E.2d at 36.

¹³⁵ *Id.*

¹³⁶ *Id.* at 41-42.

¹³⁷ *Id.* at 42.

¹³⁸ *Id.*

¹³⁹ *Silva*, 488 N.E.2d at 41.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., *Neal*, 990 F.2d at 358; *Hodges*, 936 F.2d at 372; *Pilarinos*, 864 F.2d at 255-56;

cerned a middle ground between a rigid repudiation of third party entrapment and the adoption of an expansive vicarious entrapment defense.¹⁴²

III. UNITED STATES V. HOLLINGSWORTH

In June 1994, in *United States v. Hollingsworth* ("Hollingsworth II"), the Seventh Circuit, sitting en banc, held that an Arkansas orthodontist and a farmer were not guilty of violating the federal money-laundering statute because a United States customs agent had entrapped them into the scheme.¹⁴³ The first defendant in *Hollingsworth II* was Pickard, an Arkansas orthodontist who had embarked on a distinct and quixotic career in international finance, obtaining two foreign banking licenses for that purpose.¹⁴⁴ Having lost most of his initial investment, Pickard placed an ad in *USA Today*, offering up one of the licenses (a Grenadan one) for sale.¹⁴⁵ A U.S. customs agent read the ad and reasoned that the seller might be amenable to a money laundering scheme.¹⁴⁶ After a series of fits and starts, the two agreed to make a number of significant cash deposits into an account that Pickard had established.¹⁴⁷ One of Pickard's minor investors, an Arkansas farmer named Hollingsworth, flew, for a \$405 fee, to Indianapolis to retrieve one of

Bradley, 820 F.2d at 7; *Anderton*, 629 F.2d at 1047; *Jannotti*, 501 F. Supp. at 1202; *McIntire*, 591 P.2d at 531; *Silva*, 488 N.E.2d at 41-42.

¹⁴² Compare *Anderton*, 629 F.2d at 1047 with *Beverly*, 723 F.2d at 12, and *Valencia*, 645 F.2d at 1168.

¹⁴³ 27 F.3d 1196, 1203 (7th Cir. 1994) (Posner, J.), *aff'g*, 9 F.3d 593 (7th Cir. 1993). Although this Note concerns itself mainly with the decision's implications for derivative entrapment, *Hollingsworth II* also marks a significant re-interpretation of the predisposition prong of the entrapment defense. See Martha Middleton, *Seventh Circuit Departs on Entrapment: Experts Call it a Dramatic Move*, NAT'L L.J., Nov. 15, 1993, at 9. This is so because Judge Posner's opinion interpreted *Jacobson* to have ratcheted up the Government's burden of proof from a showing of mere "willingness" on the part of the defendant to engage in the crime in question to a showing that the defendant was in "position" to engage in the crime prior to government involvement. *Hollingsworth II*, 27 F.3d at 1199-200 (citing *Jacobson v. United States*, 112 S. Ct. 1535, 1540-1543 (1992)). The court explained: "The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so[.]" *Id.* at 1200. One of three dissenting opinions sounded a note of alarm: "No longer is it enough for the government to establish that the defendant was predisposed to commit the crime; it must now also establish his 'readiness' to do so." *Id.* at 1214 (Ripple, J., dissenting).

¹⁴⁴ *Hollingsworth II*, 27 F.3d at 1200.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1201.

the deposits.¹⁴⁸ Upon Hollingsworth's return, police arrested him, as well as Pickard, for money laundering.¹⁴⁹

After concluding that Pickard lacked the predisposition to engage in money laundering absent the involvement of the government, the court moved to the question of whether Hollingsworth was eligible to raise an entrapment defense despite having had no direct contact with the customs agent.¹⁵⁰ Judge Posner's majority opinion began the inquiry by noting the truism that "[t]here is no defense of private entrapment."¹⁵¹ Judge Posner denied that a private individual, i.e., Pickard, had induced Hollingsworth, insisting instead that Pickard merely transmitted the inducement originally provided by the customs agent.¹⁵² Judge Posner conceded that the customs agent had never suggested that Pickard involve Hollingsworth or anyone else but, nonetheless, balked at the "absurdity" of acquitting Pickard and convicting Hollingsworth.¹⁵³

The Seventh Circuit stopped short of adopting the vicarious entrapment theory set forth by the Second Circuit in *Valencia*; the *Hollingsworth II* court maintained that the middleman could not merely occasion the entrapment of the distant defendant but must communicate the inducement offered by the government in an unaltered form.¹⁵⁴ Surveying the law surrounding third party entrapment, Judge Posner concluded:

Perhaps the most accurate statement of the current law is that while there is no defense of either private entrapment or vicarious entrapment, there is a defense of derivative entrapment: when a private individual, himself entrapped, acts as agent or conduit for governmental efforts at entrapment, the government as principal is bound.¹⁵⁵

¹⁴⁸ *Id.*

¹⁴⁹ *Hollingsworth II*, 27 F.3d at 1201.

¹⁵⁰ See *supra* note 143; *Hollingsworth II*, 27 F.3d at 1203. Hollingsworth did not raise the issue of entrapment at trial, preferring to rise and fall with a Due Process (i.e., Government Misconduct or "fundamental fairness") argument. See *supra* note 23. Nevertheless, the court allowed him to raise the entrapment defense on appeal because the government failed to argue waiver: "If Hollingsworth waived entrapment by putting all his eggs in the 'fundamental fairness' basket . . . the government bailed him out by waiving waiver." *Hollingsworth II*, 27 F.3d at 1203.

¹⁵¹ *Hollingsworth II*, 27 F.3d at 1203.

¹⁵² *Id.* at 1204.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Although Judge Easterbrook dissented on the grounds that the majority had misapplied *Jacobson* in altering the government's burden in showing predisposition, he tentatively accepted the majority's recognition of a derivative entrapment defense.¹⁵⁶ He conditioned his acceptance, however, on a clear delineation between derivative and vicarious entrapment.¹⁵⁷ This delineation, Judge Easterbrook asserted, involved not only the communication of the government's inducement, but also some evidence that the middleman acted to further the aims of the government in inducing the distant defendant.¹⁵⁸

What Judge Easterbrook appeared to discern was that the majority had not truly adopted a derivative entrapment scheme wholly distinct from vicarious entrapment; rather, the majority had created a hybrid defense somewhere between the two.¹⁵⁹ Although the customs agent supplied Hollingsworth's inducement, nothing in the record suggested that he intended for Pickard to take on a partner in crime.¹⁶⁰ Perhaps yielding to an equitable impulse, the *Hollingsworth II* court nonetheless held the government accountable for criminal activity beyond the original scope of its operation, if not beyond the original degree of it.¹⁶¹

The *Hollingsworth II* court's "derivative entrapment" standard, therefore, leaves itself open to the same uncertainty and complication that vicarious entrapment engenders, in spite of the court's protest that "[o]ur case is different."¹⁶² Indeed, had Hollingsworth decided to divvy up his fee with a dozen budding money-runners, who in turn proceeded to do the same, *Hollingsworth II* would afford all 145 a "derivative" entrapment defense.¹⁶³ Thus, in the end, the *Hollingsworth II* court may have done the case for a derivative entrapment defense more harm than good.¹⁶⁴

¹⁵⁶ *Hollingsworth II*, 27 F.3d at 1212 (Easterbrook, J., dissenting).

¹⁵⁷ *Id.* (Easterbrook, J., dissenting).

¹⁵⁸ *Id.* (Easterbrook, J., dissenting).

¹⁵⁹ Compare *id.* at 1204 with *id.* at 1212 (Easterbrook, J., dissenting).

¹⁶⁰ See *id.* at 1204.

¹⁶¹ See *Hollingsworth II*, 27 F.3d at 1204-05.

¹⁶² *Id.* at 1204.

¹⁶³ See *id.*

¹⁶⁴ See *id.* The Ninth Circuit Court of Appeals recently declined to follow *Hollingsworth II*, reaffirming its per se rule against any form of third party entrapment in *United States v. Manarite*. See *Manarite*, 44 F.3d 1407, 1418 (9th Cir. 1995). In *Manarite*, the FBI hatched a chip-cashing scheme at a casino with the first defendant, who in turn involved his wife (the second defendant). *Id.* at 1410. The *Manarite* court proclaimed that "inducement is government conduct that creates a substantial risk that an otherwise law-abiding person will commit a crime" but apparently assumed that such conduct could not occur through an unwitting medium, returning to the truism that "inducement by a private party is not entrapment." See *id.* at 1418 (citation omitted).

IV. THE CASE FOR DERIVATIVE ENTRAPMENT

The final part of this Note falls in two portions. The first will distill from all the case law touching upon derivative entrapment a more reasoned standard for the defense.¹⁶⁵ The second will show how, so structured, derivative entrapment comports with the original logic and purposes of the entrapment doctrine.¹⁶⁶

A. A Structure for Derivative Entrapment

This Note proposes that courts adopt a more reasoned and structured approach to the derivative entrapment defense, one that turns on two inquiries: (i) did the inducement offered to the distant defendant originate with the government; and (ii) did the government express designs on the distant defendant, in effect targeting him.¹⁶⁷ An analysis of the cases that have, explicitly or implicitly, allowed for derivative entrapment reveals that the courts make either or both inquiries.¹⁶⁸ Applied together as joint burdens that a defendant must overcome to raise a derivative entrapment defense, these requirements provide a workable structure for derivative entrapment.

1. Inducement Originating With the Government

The first requirement for defendants to raise a defense of derivative entrapment should be that defendants show that the inducement offered them (through unsuspecting middlemen and fellow defendants) originated with the government.¹⁶⁹ Courts have looked to this issue because the inducement prong of the entrapment defense has

¹⁶⁵ See *infra* text accompanying notes 167–86.

¹⁶⁶ See *infra* text accompanying notes 187–202.

¹⁶⁷ See, e.g., *United States v. Hodges*, 936 F.2d 371, 372 (8th Cir. 1991) (emphasizing designs on distant defendant); *United States v. Toner*, 728 F.2d 115, 126–27 (2d Cir. 1984) (emphasizing continuity of inducement).

¹⁶⁸ Compare *Hollingsworth II*, 27 F.3d 1196, 1204–05 (7th Cir. 1994) (requiring only continuity of inducement) with *United States v. Neal*, 990 F.2d 355, 358 (8th Cir. 1993) (requiring only designs on distant defendant) and *United States v. Jannotti*, 501 F. Supp. 1182, 1202 (E.D. Pa. 1980) (requiring both), *rev'd on other grounds*, 673 F.2d 578 (3d Cir. 1982), *aff'd*, 729 F.2d 213 (3d Cir. 1983) (en banc), *cert. denied*, 469 U.S. 880 (1984).

¹⁶⁹ *United States v. Pilarinos*, 864 F.2d 253, 256 (2d Cir. 1988) (quoting *Toner*, 728 F.2d at 126–27) (“A defendant is entitled to a derivative entrapment defense . . . when ‘the government’s inducement was directly communicated to the person seeking [the] entrapment charge’ by an unwitting middleman[.]”) (second alteration in original); cf. *People v. Wielgos*, 545 N.E.2d 1031, 1035 (Ill. App. Ct. 1989) (“[Illinois] does not require that the agent communicate only inducements flowing directly from or originating with the officer or employer.”), *rev'd on other grounds*, 568 N.E.2d 861 (Ill. 1991), *cert. denied*, 506 U.S. 844 (1992).

been restricted traditionally to government (mis)conduct.¹⁷⁰ Thus, in *Jannotti*, where agents arranged beforehand the amounts of bribes to offer to the defendants, the court found it determinative that the agents, not the middleman, functioned as the source of all inducements.¹⁷¹ The *Hollingsworth II* court also emphasized this prong, noting that the first defendant merely "transmitted" the government's inducement to the second.¹⁷²

The *Hollingsworth II* court added, however, that if the middleman alters or supplements the inducements initiated by the government, then the distant defendant cannot raise a derivative entrapment defense.¹⁷³ The same sort of reasoning led the *Silva* court to focus, in part, on the absence of a continuity of inducement in its refusal to extend to the second defendant an entrapment defense.¹⁷⁴

2. Government Designs on Defendant

The second requirement for defendants to raise a defense of derivative entrapment should be that defendants show that the government targeted them in its investigation, rather than stumbling upon them as windfall suspects.¹⁷⁵ Otherwise, as the First Circuit reasoned in *Bradley*, entrapment would come into play even in situations in which "the government is a stranger to the entire transaction."¹⁷⁶ In *Anderton*, the Fifth Circuit Court of Appeals upheld the defendant's derivative entrapment defense, in part, because of evidence that the IRS agent first mentioned him to the unsuspecting middleman and then repeatedly pressured the middleman to contact him.¹⁷⁷ Similarly, in *McIntire*, the Supreme Court of California focused on the undercover agent's use of the defendant's brother to pressure her into committing a crime.¹⁷⁸ Such conduct, the court concluded, "constitutes precisely the

¹⁷⁰ *Hodges*, 936 F.2d at 372.

¹⁷¹ 501 F. Supp. at 1197, 1202.

¹⁷² 27 F.3d at 1204.

¹⁷³ *Id.*

¹⁷⁴ *Commonwealth v. Silva*, 488 N.E.2d 34, 41 (Mass. App. Ct. 1986).

¹⁷⁵ *Hodges*, 936 F.2d at 372 ("Without evidence that the government induced . . . the middleman into *helping net* the distant defendant, the government-action requirement of an entrapment defense will not be met for that defendant.") (emphasis added); *State v. Perez*, 438 So. 2d 436, 439 (Fla. Dist. Ct. App. 1983) ("[W]here [the unsuspecting middleman] is used by [government agent(s)] for the purpose of getting a specific defendant or class of defendants involved in the commission of a crime, the entrapment defense will lie.").

¹⁷⁶ 820 F.2d at 7.

¹⁷⁷ 629 F.2d at 1047.

¹⁷⁸ 591 P.2d 527, 530 (Cal. 1979).

sort of improper fostering of crime the entrapment defense is intended to prevent."¹⁷⁹

In finding that the defendant in *Silva* had not raised a valid entrapment defense, the Massachusetts Court of Appeals also looked to whether the government had recruited the middleman in order to get to the distant defendant.¹⁸⁰ In that case, however, the court found a dearth of evidence that the government had sought to use the middleman, the proprietor of the bar, to draw the defendant, the bar patron, into a drug-dealing scheme.¹⁸¹ In *United States v. Neal*, the Court of Appeals for the Eighth Circuit declined to recognize a derivative entrapment defense even though a DEA agent had engaged the middleman who ultimately induced the defendant to commit the crime.¹⁸² The *Neal* court found it determinative that the DEA agents had set out to involve only the middleman, had never mentioned the defendant and had never asked the middleman to involve him in the scheme.¹⁸³

In summary, a workable derivative entrapment defense should consist of two inquiries. The first would require defendants to show that the inducements they relied on originated with the government.¹⁸⁴ The second would require defendants to show that the government had some designs on them originally.¹⁸⁵ Taken together, these two requirements prevent abuse of the defense by distant defendants while still holding the government accountable for its actions.¹⁸⁶

B. *Derivative Entrapment and the Purposes of Entrapment in General*

The doctrine of entrapment serves two purposes: to deter the seduction into crime of otherwise innocent citizens and to censure government misconduct.¹⁸⁷ The first purpose represents the legacy of the "subjective" theory of entrapment; the second represents that of

¹⁷⁹ *Id.*

¹⁸⁰ 488 N.E.2d at 41.

¹⁸¹ *Id.* at 41-42.

¹⁸² 990 F.2d at 356-57.

¹⁸³ *Id.* at 358.

¹⁸⁴ See, e.g., *Pilarinos*, 864 F.2d at 256.

¹⁸⁵ See *Hodges*, 936 F.2d at 372.

¹⁸⁶ See *infra* text accompanying notes 187-202.

¹⁸⁷ Delmar Karlen and J. Lawrence Schultz, *Justice in the Accusation*, in *THE RIGHTS OF THE ACCUSED IN LAW AND ACTION* 133 (Stuart S. Nagel, ed., 1972). Karlen and Schultz set forth the dual purposes of the entrapment defense:

It is commonly recognized that the entrapment defense is designed to protect two different kinds of values threatened by police promotion of crime. First, "innocent" people should not be seduced by the government to commit crimes. . . . Second,

its all-but-moribund "objective" counterpart.¹⁸⁸ Unlike other forms of third party entrapment, derivative entrapment, properly defined, comports with both.

1. Protecting Otherwise Innocent Persons

The Supreme Court has consistently made it clear that a prime purpose of the entrapment defense is to prevent "unwary innocents" from being drawn into criminal activity in which they would not otherwise have engaged.¹⁸⁹ Most recently, in *Jacobson v. United States*, the Court reiterated the importance of this purpose to entrapment doctrine, refusing to countenance activities that arguably transformed a law-abiding Nebraska farmer into a consumer of child pornography.¹⁹⁰

The cases that have swept up potential derivative entrapment defenses in per se rules against third party entrapment contravene this core purpose of the entrapment doctrine.¹⁹¹ Although these cases may not have reached the wrong conclusions, their reasoning tends to lapse into tautological pieties.¹⁹² More problematically, by calcifying the law around third party entrapment into a blanket prohibition, they forego the flexibility necessary to address instances in which the government targets an individual and induces that person to commit a crime through an unsuspecting middleman. Such a prohibition thus runs counter to the purpose of protecting otherwise innocent persons by allowing the government to corrupt and then convict such citizens, while insulating itself through an unwitting middleman.¹⁹³ In an age of

courts should not tolerate outrageous law enforcement practices, even if the defendant is "really guilty."

Id.

¹⁸⁸ See, e.g., *supra* notes 11–18 and accompanying text.

¹⁸⁹ See, e.g., *Sherman v. United States*, 356 U.S. 369, 372 (1957).

¹⁹⁰ *Jacobson v. United States*, 112 S. Ct. 1535, 1543 (1992). The dissent in *Jacobson* noted, however, that Jacobson never showed himself at all unwilling to purchase child pornography, and that he promptly ordered samples the two times that opportunity presented itself. *Id.* at 1543 (O'Connor, J., dissenting). See also *United States v. Hollingsworth*, 27 F.3d 1196, 1199–1200 (7th Cir. 1994) (en banc) (interpreting *Jacobson* as raising threshold for predisposition such that prosecution must prove not only that defendant was willing, but also that defendant was in position to act on willingness prior to government involvement).

¹⁹¹ See *supra* text accompanying notes 82–88.

¹⁹² See *Thompson v. State*, 290 N.E.2d 724, 726 (Ind. 1972) (quoting *United States v. DeLoache*, 304 F. Supp. 183, 186 (W.D. Mo. 1969)) ("Where a third party, who does not know the true identity of the Government agent, unwittingly leads the Government agent to the defendant, there is no entrapment because it is the third party who induces the initial violation, not the Government agent."), *cert. denied*, 412 U.S. 943 (1973).

¹⁹³ See *People v. McIntire*, 591 P.2d 527, 530 (Cal. 1979). The California Supreme Court noted,

stings and reverse stings, a defense of derivative entrapment would protect the otherwise innocent citizen from overweening government agents acting at one remove.¹⁹⁴

2. Censuring Government Misconduct

The entrapment doctrine's second purpose involves the censure of *government*, as opposed to private, misconduct.¹⁹⁵ Many of the decisions that questioned the broad, vicarious entrapment holding of *Valencia* did so out of concern that such a holding would render the government accountable for inducements it never generated, for crimes it never envisioned and for defendants it never targeted.¹⁹⁶ The "derivative entrapment" defense promulgated by the Seventh Circuit in *Hollingsworth II* goes halfway toward reining in this potential runaway accountability by requiring that the inducements offered to the defendant originate with the government.¹⁹⁷ Nonetheless, *Hollingsworth II* does not require the government to have targeted the defendant, leaving the door open to a potential line of unintended defendants.¹⁹⁸

Both of the requirements that this Note proposes for derivative entrapment insure that the defense would hold the government liable only for its deliberate behavior.¹⁹⁹ The requirement that the middleman directly communicate the government's inducement to the defendant ensures that the derivative entrapment defense will hold the government liable for the original *degree* of its inducement.²⁰⁰ The requirement that the government target the defendant directly similarly ensures that the government will be held liable only for the original *scope* of its inducement.²⁰¹ Thus structured, derivative entrapment avoids the potential pitfalls inherent in vicarious entrapment,

The trial court apparently accepted the prosecution's claim that entrapment cannot be effected through an unwitting agent. . . . If such were the law, unconscionable law enforcement activity would be permitted so long as the target of entrapping agents was not reached directly but indirectly through the use of unsuspecting dupes. Nothing in the doctrine of entrapment requires us to allow by indirection such an irrational and dysfunctional result.

Id.

¹⁹⁴ See *Anderton*, 629 F.2d at 1047; *Jannotti*, 501 F. Supp. at 1202-03; *McIntire*, 591 P.2d at 530.

¹⁹⁵ See *Martinez*, 979 F.2d at 1432; *Carbaljal-Portillo*, 396 F.2d at 948.

¹⁹⁶ See *supra* text accompanying notes 78-81.

¹⁹⁷ See *Hollingsworth II*, 27 F.3d at 1204-05.

¹⁹⁸ See *id.*

¹⁹⁹ See *supra* notes 167-86 and accompanying text.

²⁰⁰ See *supra* notes 169-74 and accompanying text.

²⁰¹ See *supra* notes 175-86 and accompanying text.

including a proliferation of crimes and defendants that the government never envisioned.²⁰²

C. Conclusion

The conviction of the Florida Outlaws, described in this Note's opening scenario, poses a real dilemma for entrapment as it now stands.²⁰³ The key to the dilemma is in recognizing that the Tampa Outlaws have more in common with subjects of classic entrapment than with the Daytona Outlaws, or even the St. Petersburg Outlaws. This entails recognizing, in turn, that a viable defense of derivative entrapment does not expand the parameters of traditional entrapment so much as extend them to their logical dimensions, encompassing scenarios in which the government entraps the distant defendant indirectly, but deliberately. As the government resorts increasingly to elaborate stings and undercover operations, the distant defendant caught up in them should have recourse to a reasoned defense of derivative entrapment; for not all such distant defendants are Outlaws.

JOHN E. NILSSON

²⁰² See *supra* notes 57-58 and accompanying text.

²⁰³ See *supra* notes 1-13 and accompanying text.