

Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. § 2422(b)

I. INTRODUCTION

In 2006, the National Center for Missing and Exploited Children released a disturbing report detailing the dangers that children face on the Internet today.¹ The report concluded that approximately one in seven children who used the Internet in 2005 received unwanted sexual solicitations.² Perhaps even more disturbing is the fact that four percent of minors that used the Internet in 2005 were subjected to “aggressive sexual solicitations,” which involve offline contact, such as phone calls or meetings between the pedophile and the minor.³ Further, law enforcement officials estimate that over 50,000 sexual predators are online at any given moment.⁴ As these troubling statistics suggest, protecting children from exploitation over the Internet is an equally challenging and imperative undertaking.

Recently, investigative television shows have capitalized on the online epidemic that is currently affecting the nation’s children. Shows like *Date-line NBC*’s series *To Catch a Predator* have increased public awareness of Internet dangers by trading the use of guns to pursue criminals for televised, large-scale Internet sting operations to track down sex offenders.⁵ This increased public awareness has, in turn, motivated courts and legislators to crack down on sex offenders’ abuse of the Internet.

Missouri’s effort to protect children from cyber-pedophiles has recently received help as a result of two key developments regarding enticement of minors: the Eighth Circuit decision in *United States v. Helder* and Missouri

1. Janis Wolak et al., *Online Victimization of Youth: Five Years Later* (2006), http://www.missingkids.com/en_US/publications/NC167.pdf. The National Center for Missing and Exploited Children is a private, nonprofit organization that provides services for families and professionals dealing with the prevention of abducted, endangered, and sexually exploited children. *National Mandate and Mission*, National Center for Missing and Exploited Children, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1866.

2. *Id.*

3. *Id.*

4. Chris Hansen, *Catching Potential Internet Sex Predators*, Nov. 10, 2005, <http://www.msnbc.msn.com/id/9927253/>.

5. Alessandra Stanley, *Gotcha! A Walk of Shame for Online Predators*, N.Y. TIMES, May 17, 2006, at E1.

House Bill 1698.⁶ Both *Helder* and House Bill 1698 help clarify that involvement of an actual minor victim is not required to sustain a conviction for attempted enticement of a minor under 18 U.S.C. § 2422(b).⁷ Further, *Helder* and House Bill 1698 ensure that law enforcement agents can continue to use sting operations to protect children from contact with sexual predators in the future.

This law summary analyzes the relevant law concerning attempted enticement of a minor and the potential defenses to a claim of attempted enticement under § 2422(b). Additionally, this law summary examines the current trends surrounding the crime of attempted enticement of a minor, including the growing circuit court consensus that an actual minor is not necessary for a conviction under § 2422(b), the increased use of Internet sting operations to pursue pedophiles, and the popularity of investigative television shows such as *To Catch a Predator*. Although Internet sting operations seem to be a resourceful way to track pedophiles online and protect children from contact with sexual predators, these sting operations have received criticism due to the possibility of entrapment. However, after applying the elements of an entrapment defense to Internet sting operations, it is apparent that these criticisms are unfounded. Consequently, the entrapment defense, as well as the ever-diminishing legal impossibility defense utilized in *Helder*, have both failed to give pedophiles convicted of attempted enticement of a minor under § 2422(b) much help.

II. LEGAL BACKGROUND

A. 18 U.S.C. § 2422(b)

In 1996, the Telecommunications Act added 18 U.S.C. § 2422(b), which set forth the relevant law concerning enticement of minors.⁸ The statute states:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial ju-

6. *United States v. Helder*, 452 F.3d 751 (8th Cir. 2006); H.R. 1698, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006).

7. *Id.*; 18 U.S.C. § 2422(b) (2000).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56 (1996). The Telecommunications Act added 18 U.S.C. § 2422(b) to a prior existing set of statutes that were passed in 1910 according to the White Slave Traffic Act, commonly known as the Mann Act. White Slave Traffic Act, ch. 395, 36 Stat. 826 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)). The Mann Act was ratified according to Congress' power to regulate interstate commerce as a means of addressing the problems of prostitution and immorality. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1661 (2006).

risdiction 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 10 years or for life.⁹

Sentencing under 18 U.S.C. § 2422(b) has changed dramatically since the statute was enacted in 1996. In 1998, due to the increasing number of enticement cases involving kidnapping and rape, Congress passed the Protection of Children from Sexual Predators Act as “a response to requests of victim parents and law enforcement to address public safety issues involving the most vulnerable members of our society, our children.”¹⁰ In an effort to target “pedophiles who stalk children on the Internet,”¹¹ the Act increased the maximum sentence from ten years to fifteen in an attempt to protect minors from sexual abuse and exploitation.¹² In 2003, the Protect Act raised the maximum sentence to thirty years,¹³ in addition to establishing a mandatory minimum sentence of five years.¹⁴ In 2006, again seeking to strengthen the penalties against sexual predators, Congress passed the Adam Walsh Child Protection and Safety Act, one purpose of which was “to promote Internet safety.”¹⁵ This Act increased the mandatory minimum sentence to ten years and the maximum sentence to life under § 2422(b).¹⁶

Under § 2422(b), a defendant may not only be convicted of enticement of a minor for communicating with an actual child, but may also be convicted of *attempted* enticement of a minor under the statute.¹⁷ Rather than enticing an actual minor, convictions for attempted enticement under § 2422(b) commonly arise through Internet sting operations involving law enforcement agents posing as minors.

9. 18 U.S.C. § 2422(b).

10. H.R. REP. NO. 105-557, at 12 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 681.

11. *Id.*

12. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 102(2), 112 Stat. 2974, 2975-76 (1998).

13. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (Protect Act), Pub. L. No. 108-21, § 103(a)(2)(B), 117 Stat. 650, 652 (2003).

14. *Id.* at § 103(b)(1)(C)(i).

15. Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587 (2006).

16. *Id.* at § 203, 120 Stat. 587, 613.

17. 18 U.S.C. § 2422(b) (2000).

B. The Definition of Attempt

Under current United States law, specifically 18 U.S.C. § 2422(b), sexual predators may be convicted of *attempting* to entice a minor to engage in sexual activity.¹⁸ The statute sets forth that “[w]hoever . . . knowingly persuades, induces, entices, or coerces any [minor] to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or *attempts to do so*, shall be [convicted under the statute.]”¹⁹ The crime of attempt exists “to punish those who have tried, but failed, to commit a substantive offense.”²⁰ Although one rationale for punishing criminal attempt is to allow law enforcement officials to prevent crime before it is completed, many scholars agree that the primary purpose for punishing attempt is to reprimand individuals who have sufficiently demonstrated their dangerousness.²¹

To convict a defendant of criminal attempt, the government must prove that (1) the defendant “acted with the kind of culpability otherwise required for the commission of the underlying substantive offense,” and (2) the defendant “engaged in conduct which constitutes a substantial step toward commission of the crime.”²² To prove the first element of attempt, the government must simply show that the defendant had the requisite specific intent to commit the underlying crime.²³ However, proving the second element of attempt, the substantial step, is more complicated.

In order to constitute a substantial step, the defendant must engage in “conduct which strongly corroborates the firmness of defendant’s criminal attempt.”²⁴ Thus, the substantial step “must mark the defendant’s conduct as criminal.”²⁵ A substantial step goes beyond mere preparation before committing a crime, but is less than the last act necessary before the actual commis-

18. *Id.*

19. *Id.* (emphasis added).

20. Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 479 (2004). In early English law, “an attempt to do harm” was not a crime because of the reluctance to punish where no outward, harmful result occurred. *Id.* at 480. Thus, it was not until 1784 that England established the common law offense of attempt. Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 238 (1995).

21. Donna Sternicki, Note, *The Void Left in Illinois Homicide Law After People v. Lopez: The Elimination of Attempted Second Degree Murder*, 46 DEPAUL L. REV. 227, 230 (1996).

22. *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001).

23. *United States v. Burks*, 135 F.3d 582, 583 (8th Cir. 1998).

24. *Farner*, 251 F.3d at 513.

25. *United States v. Root*, 296 F.3d 1222, 1228 (11th Cir. 2002). To be considered a substantial step, the defendant’s acts should “‘strongly corroborate the required culpability; they must not be equivocal.’” *Id.* (quoting *United States v. Carothers*, 121 F.3d 659, 661 (11th Cir. 1997); *United States v. McDowell*, 705 F.2d 426, 428 (11th Cir. 1983)).

sion of the crime.²⁶ Furthermore, in order for behavior to constitute a substantial step, “it need not be incompatible with innocence.”²⁷ However, the act must be necessary for the completion of the substantive crime and be of such a nature that a reasonable person could conclude beyond a reasonable doubt that the act was undertaken to violate the law.²⁸

If the government is able to show attempted enticement under the above two factor test, the accused has a few options in asserting a defense. These defenses include legal impossibility, entrapment, outrageous government conduct, and the wiretap defense.²⁹

C. The Legal Impossibility Defense

One possible defense to the crime of attempting to entice a minor is legal impossibility.³⁰ In a typical sting operation in which a sexual predator attempts to entice a child over the Internet, the sexual predator actually chats online with an adult law enforcement agent the entire time, and the minor the predator believes he is talking to never really exists.³¹ Those who are convicted of attempt under 18 U.S.C. § 2422(b) can argue impossibility as a defense by stating that “the defendant could not have committed a crime because no child actually existed to entice for illegal sexual acts.”³²

Impossibility in criminal law is “[a] fact or circumstance preventing the commission of a crime.”³³ Although the first impossibility defense adopted by the courts was very broad,³⁴ the courts eventually narrowed the defense and distinguished between two types of impossibility: factual impossibility

26. *Burks*, 135 F.3d at 583.

27. *United States v. Mazzella*, 768 F.2d 235, 240 (8th Cir. 1985).

28. *Id.*

29. See Danica Szarvas-Kidd, *Electronic Luring Statutes Under Fire: How the Courts Have Responded to Constitutional Challenges and Notable Defenses to Luring Crimes*, 40 PROSECUTOR 42, 44 (Aug. 2006).

30. See BLACK’S LAW DICTIONARY 771 (8th ed. 2004). Impossibility is the defense utilized by the defendant in *United States v. Helder*, 452 F.3d 751, 753 (8th Cir. 2006).

31. 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, 766 (2004).

32. Szarvas-Kidd, *supra* note 29, at 44.

33. BLACK’S LAW DICTIONARY 771 (8th ed. 2004). The impossibility defense originated as a response to attempt crimes due to early England’s reluctance to punish attempt. Rogers, *supra* note 20, at 493. The impossibility defense was considered for the first time in the 1846 case of *Regina v. Goodchild*. Brodie, *supra* note 20, at 238 n.9. Early English courts held that “an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged.” Rogers, *supra* note 20, at 493.

34. Rogers, *supra* note 20, at 493.

and legal impossibility.³⁵ Factual impossibility, which can never be a defense to the crime of attempt, is “[i]mpossibility due to the fact that the illegal act cannot physically be accomplished.”³⁶ “[F]actual impossibility is not a defense to [a] crime if the defendant could have committed the crime had the attendant circumstances been as the actor believed them to be.”³⁷ Legal impossibility, which may be a defense to attempt, is “[i]mpossibility due to the fact that what the defendant intended to do is not illegal even though the defendant might have believed that he or she was committing a crime.”³⁸ Legal impossibility is where a defendant’s actions, even if carried out, do not constitute a crime because an element of the crime has not been satisfied.³⁹

D. The Entrapment Defense

Entrapment is another possible defense to the crime of attempted enticement of a minor.⁴⁰ Whereas legal impossibility focuses on the defendant’s inability to complete the crime that he was attempting to commit, entrapment argues that the defendant lacked the predisposition to even commit a crime. Entrapment occurs when a law enforcement officer induces “a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person.”⁴¹ The purpose of the entrapment defense is to protect an otherwise disinclined defendant from governmental coercion into criminal action.⁴²

There are two elements to the modern entrapment defense: (1) “government inducement of the crime” and (2) “a lack of predisposition on the part of

35. *United States v. Farner*, 251 F.3d 510, 512 (5th Cir. 2001).

36. BLACK’S LAW DICTIONARY 771 (8th ed. 2004).

37. *United States v. Helder*, 452 F.3d 751, 754 (8th Cir. 2006).

38. BLACK’S LAW DICTIONARY 771 (8th ed. 2004).

39. *Id.* For example, legal impossibility occurs if a person hunts while incorrectly believing that it is not hunting season, or a person attempts to shoot another with an unloaded gun but the relevant statute requires the gun to be loaded. *Id.* at 771-72.

40. *Id.* at 573. Entrapment is an affirmative defense. *United States v. El-Gawli*, 837 F.2d 142, 148 (3d Cir. 1988).

41. BLACK’S LAW DICTIONARY 573 (8th ed. 2004). Entrapment was first considered in the 1878 case of *Saunders v. People*. *People v. Turner*, 210 N.W.2d 336, 338 (Mich. 1973). In *Saunders*, a police officer notified a lawyer that he would leave a courtroom door unlocked after hours so the lawyer could retrieve documents. *Saunders v. People*, 38 Mich. 218, 1878 WL 2542, *1 (1878). When the attorney showed up at the court, the police officer arrested the attorney for breaking and entering. *Id.* The Michigan Supreme Court determined that the police officer “was apparently conniving at and assisting in the crime charged; and though he may have done this, as he says, not by way of enticing defendant into crime, but only by allowing him the opportunity he sought and requested, yet it placed him in an equivocal position.” *Id.*

42. *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

the defendant to engage in the criminal conduct.”⁴³ The first element, inducement, is “government conduct which creates a substantial risk that an . . . otherwise law-abiding citizen would commit the offense.”⁴⁴ Inducement refers to conduct that persuades the defendant to turn “from a righteous path to an iniquitous one.”⁴⁵ Inducement by the government may take the form of persuasion, harassment, fraudulent representations, threats, promises, or pleas.⁴⁶ For the defendant to prevail under an entrapment defense, most states require that the defendant show that he would not have committed the crime but for fraud or undue persuasion.⁴⁷ Evidence that a law enforcement agent approached, solicited, or requested the defendant to engage in criminal conduct, standing alone, is not enough to constitute inducement.⁴⁸ Inducement will not be established by evidence that the government agent initiated the contact with the defendant or proposed the crime,⁴⁹ because mere solicitation or the creation of opportunities to commit an offense are not adequate to prove entrapment.⁵⁰

If the defendant is successful in proving inducement, the defendant must then show that he lacked the predisposition necessary for the crime.⁵¹ The chief element in an entrapment defense, predisposition, is “a defendant’s inclination to engage in the illegal activity for which he has been charged, i.e. that he is ready and willing to commit the crime.”⁵² This element focuses on whether the defendant was an “unwary criminal who readily availed himself of the opportunity to perpetrate the crime.”⁵³ Predisposition may be inferred from a defendant’s history of involvement in the type of criminal activity for which he has been charged, along with his ready response to the inducement offer.⁵⁴

After the defendant produces evidence of the elements of entrapment, the government may then attempt to prove beyond a reasonable doubt that it did not provoke the defendant’s commission of the crime.⁵⁵ If the government is successful, the inquiry is over because, “[w]ithout inducement by the government, there can be no entrapment.”⁵⁶ However, if the government is not successful, the question of predisposition is key and the government must

43. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

44. *Ortiz*, 804 F.2d at 1165.

45. Szarvas-Kidd, *supra* note 29, at 44.

46. *Ortiz*, 804 F.2d at 1165.

47. BLACK’S LAW DICTIONARY 573 (8th ed. 2004).

48. *Ortiz*, 804 F.2d at 1165.

49. *Id.*

50. Szarvas-Kidd, *supra* note 29, at 44.

51. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

52. *Ortiz*, 804 F.2d at 1165.

53. *Mathews*, 485 U.S. at 63.

54. *Ortiz*, 804 F.2d at 1165.

55. *United States v. El-Gawli*, 837 F.2d 142, 148 (3d Cir. 1988).

56. *Id.*

prove that its provocation merely facilitated the defendant who was already willing to commit the crime.⁵⁷

E. Other Defenses to the Crime of Attempt

In addition to legal impossibility and entrapment, a defendant convicted of attempting to entice a minor could assert the defense of outrageous government conduct or the wiretap defense.⁵⁸ Outrageous government conduct, which is similar to the entrapment defense, refers to government actions that are so outrageous that they violate due process.⁵⁹ In considering the defense, courts evaluate two factors: (1) the government's creation of the crime, and (2) substantial coercion.⁶⁰ The main difference between entrapment and outrageous government conduct is that, while "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."⁶¹

The wiretap defense, a unique defense in Internet enticement cases, is used to challenge the admission of the online conversations into evidence.⁶² In utilizing the defense, the purported sexual predator argues that the conversation "was improperly recorded without the defendant's consent in violation of the wiretap statute."⁶³ In analyzing the defense, the court will determine if the conversation was intercepted and if the defendant consented to the interception.⁶⁴

Invoking these defenses has become an issue lately due to the recent development of the Internet sting operation and its use to track down many pedophiles online, which has resulted in an increased number of convictions under § 2422(b). In the Discussion section, this law summary will deconstruct some of the commonly used defenses and apply them to Internet sting operations which result in convictions for attempted enticement under § 2422(b).

57. *Id.*

58. *See* Szarvas-Kidd, *supra* note 29, at 44.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.*

III. RECENT DEVELOPMENTS

A. Internet Sting Operations

In the 1990s, the Internet began to take on a major role in everyday life.⁶⁵ Unfortunately, the Internet's widespread popularity also created a dangerous tool for sexual predators. Due to the prevalence of the Internet, "[p]erfect strangers can reach into the home and befriend a child."⁶⁶ With the arrival of ever-growing computer technology, law enforcement officials are discovering that criminals can roam the Internet even easier than they can roam the streets.⁶⁷ The anonymous nature of the Internet allows pedophiles to misrepresent their age, gender, or interests in order to further lure unsuspecting children into a conversation.⁶⁸ Because of this anonymity, sexual predators often cruise the Internet in search of lonely, confused, or trusting young people.⁶⁹

Law enforcement's response to the emergence of the Internet sex offender was the Internet sting operation.⁷⁰ Due to the materialization of the Internet as a tool for sex offenders, law enforcement agents have "been forced to resort to extensive investigation and sting operations to ferret out pedophiles who troll the Internet for minors."⁷¹ Such Internet sting operations typically involve law enforcement agents communicating with online predators while pretending to be a child.⁷² Before the Internet gained popularity, convictions in child abuse cases could only take place after a report of actual abuse.⁷³ Now, law enforcement agents have the ability to utilize sting operations in order to stop pedophiles before they come into contact with children on the Internet.⁷⁴

Lately, law enforcement agents have discovered a more widespread way of targeting online sex offenders through sting operations. Highly publicized news accounts of large-scale sting operations, such as *Dateline NBC's* series *To Catch a Predator*,⁷⁵ have helped law enforcement agents expose the grow-

65. See Encyclopedia Britannica Online, *Internet*, <http://www.britannica.com/ebc/article-9368096>.

66. H.R. REP. NO. 105-557, at 12 (1998), reprinted in 1998 U.S.C.C.A.N. 678, 680.

67. *Id.* at 11, reprinted in 1998 U.S.C.C.A.N. 678, 680.

68. *Id.* at 12, reprinted in 1998 U.S.C.C.A.N. 678, 680.

69. *Id.* at 11-12, reprinted in 1998 U.S.C.C.A.N. 678, 680.

70. *United States v. Meek*, 366 F.3d 705, 719 (6th Cir. 2000).

71. *Id.*

72. Book, *supra* note 31, at 754.

73. *Id.*

74. *Id.*

75. See Chris Hansen, *Dangers Children Face Online*, Nov. 11, 2004, <http://www.msnbc.msn.com/id/6083442/> [hereinafter Hansen, *Dangers*]. *To Catch a Predator* is a television series which is devoted to identifying and detaining potential

ing dangers that children face on the Internet.⁷⁶ Along with providing a warning to the public about the pedophiles that lurk online, the shows have also helped to deter sex offenders who stalk children on the Internet.⁷⁷ Although some critics praise shows like *To Catch a Predator* for heightening public awareness and providing a deterrent,⁷⁸ others criticize the programs due to the appearance of entrapment and public humiliation of the sexual predators.⁷⁹

This increased public awareness of the dangers children face on the Internet has motivated courts and legislators to crack down on sex offenders' abuse of the Internet. Recently, there have been new developments in Missouri law concerning attempted enticement of minors under § 2422(b) and the use of Internet sting operations to catch pedophiles. The new developments are the result of the Eighth Circuit's decision in *United States v. Helder*⁸⁰ and Missouri House Bill 1698.⁸¹ *Helder* and House Bill 1698 both reaffirm the validity of Internet sting operations, as well as make it difficult for defendants convicted under § 2422(b) to assert a successful defense.⁸²

online sex offenders. *Id.* The show operates as an undercover Internet sting operation that includes law enforcement agents working with volunteers from an "online vigilante group" who pose as minors in chat rooms. *Id.* The predators who engage in sexually explicit conversations are invited by the "minor" to a covert house where the predators are eventually arrested and interviewed on television. *Id.* Since the show began in 2004, the show has assisted in apprehending almost 200 sex offenders. Chris Hansen, *To Catch a Predator III* (2006), <http://www.msnbc.msn.com/id/11152602/>.

76. See Hansen, *Dangers*, *supra* note 75. "While parents strive to warn their children about the dangers outside of the home, [parents] are often unaware of the dangers" on the Internet. H.R. Rep. No. 105-557, at 11 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 680. Since men "from all walks of life" appear on *To Catch a Predator*, including men who are well-educated and widely respected in their communities, the show provides a caution to parents by illustrating that anyone can be a potential sexual predator, including coaches, teachers, clergymen, attorneys, and politicians. Chris Hansen, *Potential Predators in Petaluma*, <http://www.msnbc.msn.com/id/15066391/> [hereinafter Hansen, *Potential Predators*].

77. See Hansen, *Potential Predators*, *supra* note 76. After *To Catch a Predator*'s initial installments, many of the men arrested in subsequent shows acknowledged that they had seen the *Dateline* special before. *Id.* Some even expressed their reservations about taking the cyber conversations to the next level by coming to the minor's house due to fear that a sting operation would be involved. *Id.*

78. See Stanley, *supra* note 5 (stating that "[h]owever sensationalist and unsavory, [*To Catch a Predator*] is hard to fault; its targets deserve worse than a [*Dateline*] walk of shame.").

79. See Posting of Brian Montopoli to Public Eye, <http://www.cbsnews.com/blogs/2006/02/07/publiceye/entry1290135.shtml> (Feb. 7, 2006, 11:20 AM).

80. 452 F.3d 751 (8th Cir. 2006).

81. H.R. 1698, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006).

82. See *id.*; *Helder*, 452 F.3d at 756.

B. United States v. Helder

The United States Court of Appeals for the Eighth Circuit recently had the chance to decide on the issue of attempted enticement of minors under 18 U.S.C. 2422(b) in the case of *United States v. Helder*.⁸³ The question of whether attempted enticement of a minor requires an actual minor victim was one of first impression for the Eighth Circuit.⁸⁴

In *Helder*, Jan Helder, Jr., a 41-year-old male attorney, entered an Internet chat room while at his law office.⁸⁵ Shortly after entering the chat room, Helder sent an instant message to the screen name “lisa_mo_13.”⁸⁶ “Lisa_mo_13” was actually an undercover officer posing as a 14-year-old girl.⁸⁷ During the conversation, Helder eventually asked “lisa_mo_13” if she was looking for a sexual experience with an older man.⁸⁸ “Lisa_mo_13” answered affirmatively and Helder indicated that he would meet her at her apartment.⁸⁹ Helder arrived at the apartment where the undercover officer was waiting.⁹⁰ Before the officer could confront Helder though, Helder spotted the officer and promptly drove away.⁹¹

The officer obtained a search warrant for Helder’s law office computer⁹² and interviewed Helder at his home.⁹³ During the questioning, “Helder admitted that what he did was wrong” and “said he would never do it again.”⁹⁴ However, Helder also stated that he never intended to have sex with a minor, that he believed it was an online sting,⁹⁵ and that he only traveled to the apartment “out of curiosity.”⁹⁶

83. See 452 F.3d 751. Another relevant decision from the Eighth Circuit is *United States v. Hicks*, 457 F.3d 838 (8th Cir. 2006), which was handed down just days after *Helder* was decided.

84. *Helder*, 452 F.3d at 753.

85. *Id.* at 751.

86. *Id.*

87. *Id.*

88. *Id.* at 752. Helder also asked “lisa_mo_13” a series of questions, including inquiries about where she lived, her clothing, her bra size, her sexual experience, and if her mother was home. *Id.* at 751-52.

89. *Id.* at 752. After the chat ended, the undercover officer obtained Helder’s online profile, which contained a photograph of Helder, and traced Helder’s profile to his law office computer. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Helder was not present when the search warrant was executed. *Id.*

93. *Id.*

94. *Id.*

95. During his chat with “lisa_mo_13”, Helder mentioned the possibility of online sting operations occurring in the chat room and explained that a local television station recently conducted an investigative sting designed to catch people attempting to meet underage boys or girls. *Id.*

96. *Id.*

Helder was later arrested and charged with violating 18 U.S.C. § 2422(b) by “using a facility of interstate commerce, the Internet, to attempt to entice a minor to engage in illegal sexual activity.”⁹⁷ Helder moved for judgment of acquittal at the close of the government’s evidence, asserting “that the government’s case failed for ‘legal impossibility’ because [the statute] requires that the targeted victim be an actual minor,” not merely a law enforcement agent posing as a child.⁹⁸ The district court initially rejected Helder’s argument,⁹⁹ and a jury found Helder guilty.¹⁰⁰ However, the court later set aside the guilty verdict and granted Helder’s renewed motion for judgment of acquittal.¹⁰¹ The court held that “the plain reading of the statute requires the government to prove that the individual involved in the communication was under the age of 18.”¹⁰² The government appealed the district court’s order, arguing that “18 U.S.C. § 2422(b) does not require that the intended victim be an actual minor.”¹⁰³ The government claimed that “Helder violated the Act because Helder believed that he was communicating with a minor and thus made an attempt to entice a minor into engaging in unlawful sexual activity.”¹⁰⁴

In the instant decision, the Eighth Circuit looked to similar cases it had decided for guidance.¹⁰⁵ In previous cases involving enticement of a minor under the statute, the court “upheld attempt convictions under 18 U.S.C. § 2422(b) where the enticed ‘minor’ was actually an undercover police officer.”¹⁰⁶ Along with these previous cases, the court also looked to its decision in *United States v. Blazek*¹⁰⁷ where, under plain error review, it “rejected a defendant’s argument that the evidence was insufficient to convict him of attempting to entice a minor because an undercover officer actually posed as a minor.”¹⁰⁸ Since the defendant in *Blazek* based his argument on the district

97. *Id.* at 751.

98. *Id.* at 753.

99. *Id.* The court encouraged Helder to renew his motion at the close of the case though. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 754. While the “minor” in each of these cases was an undercover officer, the issue of whether the intended victim must be an actual minor was never raised or discussed in previous Eighth Circuit cases. *See* *United States v. Patten*, 397 F.3d 1100, 1103 (8th Cir. 2005); *United States v. Naiden*, 424 F.3d 718, 723 (8th Cir. 2005); *United States v. Dickson*, 149 Fed. Appx. 543, 544 (8th Cir. 2005).

107. 431 F.3d 1104 (8th Cir. 2005). *Blazek* was decided after the district court’s decision in *Helder*, but before the case was ruled upon by the Eighth Circuit. *Helder*, 452 F.3d at 754.

108. *Helder*, 452 F.3d at 754.

court's decision in *Helder*, the Eighth Circuit, which had yet to rule on *Helder*, found that even if it decided to affirm the district court's decision to grant the motion for judgment of acquittal in *Helder*, the evidence in *Blazek* was sufficient to convict the defendant of attempted enticement of a minor because the error was "not plain at [that] time."¹⁰⁹

After the Eighth Circuit looked to similar cases in its own circuit, the court then focused on other circuits' findings on the issue.¹¹⁰ The court noted decisions from several circuits,¹¹¹ which all found that an actual minor is not necessary for conviction under § 2422(b).¹¹² Based on the other "circuits' thorough analysis of the plain meaning of the statute," as well as prior similar cases decided in the Eighth Circuit, the court held that "an actual minor victim is not required for an attempt conviction under § 2422(b)."¹¹³ Therefore, the court reversed the district court's order granting *Helder*'s motion for judgment of acquittal.¹¹⁴

C. Similar Decisions in Other Circuits

Nine circuits have now ruled that 18 U.S.C. § 2422(b) does not require that an actual child be involved in order to sustain a conviction for attempted enticement of a minor.¹¹⁵ Particularly persuasive opinions from the Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits offer useful guidelines for determining the necessity of an actual minor for an attempt conviction under § 2422(b).¹¹⁶

For example, in *U.S. v. Tykarsky*, the Third Circuit decided to "join several sister courts of appeals in holding that the involvement of an actual minor, as distinguished from a government decoy, is not a prerequisite to conviction under 18 U.S.C. § 2422(b)."¹¹⁷ In that case, an undercover FBI agent posed as a 14-year-old girl in a chat room and communicated with the defendant about sexually explicit subjects through instant messages.¹¹⁸ After the defendant arranged to meet the "girl" for sexual intercourse, the defendant

109. *Id.*

110. *Id.*

111. The decisions noted were from the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits. *Id.* at 754-56.

112. *Id.*

113. *Id.* at 756.

114. *Id.* The court also remanded the case to the district court for sentencing. *Id.*

115. See *United States v. Brand*, 467 F.3d 179, 202 (2d Cir. 2006). Only the First and Fourth Circuits have not had the opportunity to rule on the issue. *Id.* Although nine circuits have now ruled on the issue, this law summary will only look to seven of the circuits, thereby excluding decisions from the Second and Seventh Circuit.

116. See *Hedler*, 452 F.3d 751, 756.

117. 446 F.3d 458, 461 (3d Cir. 2006).

118. *Id.* at 464.

was arrested and convicted of attempting to entice a minor.¹¹⁹ Using the legal impossibility defense, the defendant argued that “the evidence was insufficient to support his conviction on either count because it showed only that he had communicated and traveled to engage in sexual activity with an adult undercover agent.”¹²⁰ In deciding the case, the court focused on discerning Congress’ legislative intent.¹²¹ “After examining the text of the statute, . . . [the court] conclude[d] that Congress did not intend to allow the use of an adult decoy . . . to be asserted as a defense to § 2422(b).”¹²²

Likewise, the Fifth Circuit has also addressed the issue of attempted enticement of a minor. In *United States v. Farner*, the defendant made sexual advances over the Internet to a person he thought was a minor.¹²³ When the defendant went to meet the “minor,” she turned out to be a federal agent and the defendant was arrested.¹²⁴ The Fifth Circuit rejected the defendant’s argument that “it was legally impossible for him to have committed the crime since the ‘minor’ involved in this case was actually an adult.”¹²⁵ The court found that the defendant intended to engage in sexual acts with a 14-year-old girl, and that he took substantial steps toward committing the crime because the defendant’s scheme, if fully carried out as he had planned, was not to engage in sexual relations with an adult FBI officer, but was to entice a minor.¹²⁶ Therefore, the evidence satisfied both of the requirements for an attempt conviction.¹²⁷

Similarly, in the Sixth Circuit decision of *United States v. Bailey*, the defendant attempted to set up meetings with various minors that he met on the Internet.¹²⁸ The court stated that, “[w]hile it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents.”¹²⁹ Further, when interpreting the plain language of § 2422(b), the court declared that “Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.”¹³⁰ As a result, in a case of first impression for the court, the Sixth Circuit held that “a conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade.”¹³¹

119. *Id.* at 462.

120. *Id.* at 465.

121. *Id.* at 466.

122. *Id.*

123. *See* 251 F.3d 510 (5th Cir. 2001).

124. *Id.*

125. *Id.* at 512.

126. *Id.* at 513.

127. *Id.*

128. *See* 228 F.3d 637, 639-40 (6th Cir. 2000).

129. *Id.* at 639.

130. *Id.*

131. *Id.*

The decision in *United States v. Meek* allowed the Ninth Circuit to “join [its] sister circuits in concluding that ‘an actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b).’”¹³² In *Meek*, a detective discovered sexually explicit photographs of a 14-year-old boy.¹³³ The detective located the boy and got permission to assume the boy’s identity on the Internet.¹³⁴ The “boy” was contacted by the defendant and the defendant was arrested when he attempted to meet the “boy” at a local school.¹³⁵ In deciding the case, the court reasoned that it would be contrary to the purpose of the statute to “distinguish the defendant who attempts to induce an individual who turns out to be a minor from the defendant who, through dumb luck, mistakes an adult for a minor.”¹³⁶ The court set forth that the elements of criminal liability under § 2422(b) are that “a person must ‘knowingly’¹³⁷ (1) actually or attempt to (2) persuade, induce, entice, or coerce (3) a person under 18 years of age (4) to engage in sexual activity that would constitute a criminal offense.”¹³⁸ The court stated that the statute requires mens rea, namely a guilty mind, and “[t]he guilt arises from the defendant’s knowledge of what he intends to do.”¹³⁹ Since knowledge is subjective, the court found that “a jury could reasonably infer that Meek knowingly sought sexual activity, and knowingly sought it with a minor.”¹⁴⁰

Additionally, in the Tenth Circuit opinion of *United States v. Sims*, the defendant conducted a sexually explicit conversation with a screen name he believed to belong to two teenage girls.¹⁴¹ In fact, the screen name belonged to an adult man who claimed that he had assumed the Internet profile of a teenage girl as a gag.¹⁴² The FBI became involved, and the defendant was ultimately arrested.¹⁴³ The defendant argued that because an actual minor did

132. 366 F.3d 705, 717 (9th Cir. 2004).

133. *Id.* at 709.

134. *Id.*

135. *Id.* at 710-11.

136. *Id.* at 718. The court stated that “[t]o hold otherwise would bestow a windfall to one defendant when both are equally culpable.” *Id.*

137. The term “knowingly” refers both to verbs, including “persuades, induces, entices, or coerces,” as well as to the object, which is “a person who has not achieved the age of 18 years.” *Id.*

138. *Id.*

139. *Id.* The court stated that the defendant’s “extensive sexual dialog, transmission of a sexually-suggestive photograph, repeated sexual references as to what [the defendant] would do when he met the boy, and his travel to meet the minor at a local school mark his conduct as criminal in nature.” *Id.* at 720.

140. *Id.* at 718. The fact that the defendant was mistaken in his belief that there was an actual minor “does not mitigate or absolve his criminal culpability; the simple fact of [the defendant’s] belief is sufficient.” *Id.* at 720.

141. 428 F.3d 945, 950 (10th Cir. 2005).

142. *Id.* For months, the defendant sent sexually explicit images of himself and other children to the “girls.” *Id.*

143. *Id.*

not exist, the defendant could not be convicted of violating § 2442(b).¹⁴⁴ The court joined the majority of circuits by ruling against the defendant and proclaiming that “it is not a defense to an offense involving enticement and exploitation of minors that the defendant falsely believed a minor to be involved.”¹⁴⁵

Finally, in *United States v. Root*, an Eleventh Circuit case, the defendant contacted an investigator that he believed to be a 13-year-old girl in an online chat room.¹⁴⁶ When the defendant went to meet the “girl” at a mall, the defendant was arrested for attempting to entice a minor.¹⁴⁷ The Eleventh Circuit held that “an actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b).”¹⁴⁸ The court noted that it had affirmed attempt convictions when “a defendant did not actually commit the final act required for conviction for the underlying crime,” as well as when “the defendant could not have achieved the final required act because it would have been impossible to commit the actual crime.”¹⁴⁹ Therefore, the court found that “[t]he fact that [the defendant’s] crime had not ripened into a completed offense is no obstacle to an attempt conviction.”¹⁵⁰ The defendant’s “belief that a minor was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b).”¹⁵¹

These decisions by various circuits have set the standard for other courts’ conclusions in enticement of minor cases, including the Eighth Circuit’s decision in *Helder*. In turn, decisions such as these have persuaded state courts and legislatures to reevaluate their findings and laws regarding sex offenders and enticement of minors.

D. Missouri House Bill 1698

Along with *Helder*, another significant recent development in Missouri concerning enticement of minors is Missouri House Bill 1698.¹⁵² House Bill 1698 supports the holding in *Helder* by stating that the fact that the “minor” involved was actually a law enforcement agent posing as a child is not a defense to attempted enticement of a minor.¹⁵³ In 2005, Missouri Governor

144. *Id.* at 959.

145. *Id.* at 960. The Tenth Circuit also held that “[f]actual impossibility is generally not a defense to criminal attempt because success is not an essential element of attempt crimes.” *Id.* at 959-60 (quoting *United States v. Hankins*, 127 F.3d 932, 934 (10th Cir. 1997)).

146. 296 F.3d 1222, 1224 (11th Cir. 2002).

147. *Id.* at 1226.

148. *Id.* at 1227.

149. *Id.* at 1228-29.

150. *Id.* at 1227.

151. *Id.*

152. H.R. 1698, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006).

153. *Id.*

Matt Blunt called for changes in Missouri's law that would protect Missouri's children and ensure that sexual predators serve lengthy minimum prison sentences.¹⁵⁴ As a result, House Bill 1698 was signed into law on June 6, 2006.¹⁵⁵

The effect of this bill was to “[strengthen] laws protecting children from predators who use the internet to access victims” and to create a grant program to help investigate Internet sex crimes against children.¹⁵⁶ The measure imposes a minimum prison sentence of five years without probation or parole on those convicted of enticing or attempting to entice a child for a sexual purpose.¹⁵⁷ The new law prescribes that an attempt conviction does not require an actual minor by stating that “it is not an affirmative defense to a prosecution . . . that the other person was a peace officer masquerading as a minor.”¹⁵⁸

Further, the legislation sets forth that “the department of public safety shall create a program to distribute grants to multijurisdictional Internet cyber crime law enforcement task forces and other law enforcement agencies.”¹⁵⁹ These grants help pay for both the training and salaries of detectives and computer forensic personnel who investigate Internet sex crimes against children, including the crime of enticement of a minor.¹⁶⁰

The recent developments encompassed in *Helder* and House Bill 1698 both affirm that attempted enticement of a minor does not require that the intended victim be an actual child.¹⁶¹ The following discussion examines these developments' impact on children's safety and law enforcement's ability to protect children through Internet sting operations. Further, this law summary will show that opponents of Internet sting operations are wrong in alleging entrapment because, after applying the elements of entrapment to Internet sting operations, it becomes obvious that entrapment is rarely a suc-

154. Press Release, Statement from Gov. Matt Blunt on Senate Action to Protect Children (May 4, 2006), *available at* <http://www.gov.mo.gov/press/Statement050406.htm>.

155. Press Release, Blunt Praises Legislation Keeping Sexual Predators Away from Children (May 11, 2006), *available at* <http://www.gov.mo.gov/press/HB1698051106.htm>.

156. *Id.* Another outcome of the bill was that Missouri achieved “perhaps the toughest laws against child predators of any state in the nation.” Eric G. Zahnd, *Missouri Gets Tough on Those Who Prey on Children*, KANSAS CITY STAR, June 9, 2006, at B8.

157. H.R. 1698, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006). The maximum sentence set forth in the legislation is thirty years. *Id.*

158. *Id.*

159. *Id.* Governor Matt Blunt “plans to approve the \$250,000 allocated in next fiscal year's budget for the grant program.” Press Release, Blunt Fulfills Promise; Signs Priority Legislation to Protect Children from Sexual Predators (June 6, 2006), *available at* <http://www.gov.mo.gov/press/ProtectChildren060606.htm>.

160. H.R. 1698.

161. *See United States v. Helder*, 452 F.3d 751 (8th Cir. 2006); H.R. 1698.

cessful defense. Finally, the elements of the commonly used defense of legal impossibility will also be applied to Internet sting operations to reveal that this defense is also useless to pedophile-defendants convicted under § 2422(b).

IV. DISCUSSION

In following the decisions of its sister courts, the Eighth Circuit took a strong stance against sexual predators in *United States v. Helder* by asserting that a conviction for attempted enticement of a minor under 18 U.S.C. § 2422(b) does not require an actual child. Furthermore, in enacting Missouri House Bill 1698, the Missouri legislature made an important move towards protecting children by increasing penalties for sex offenders and asserting that an actual minor is not necessary for conviction.

Protecting children's innocence is one of society's most important responsibilities.¹⁶² Taken together, House Bill 1698 and *Helder* have helped Missouri fulfill this responsibility by making Missouri a safer place for children.¹⁶³ By allowing law enforcement agents to continue to pose as minors, defenseless children will not have to endure the manipulation of a sexual predator in order for the predator to be convicted under § 2422(b). The facts of enticement cases are extremely disturbing in that the sexual predator often explicitly describes the sexual acts he wishes to engage in with the minor via chat room discussions.¹⁶⁴ In addition, the predator will often send images to the minor, including child pornography or sexually explicit photos of the predator.¹⁶⁵ By permitting a law enforcement officer to step in as the minor, the decision in *Helder* and the new legislation in House Bill 1698 allow the law to continue to take the child out of harm's way and save actual minors

162. President George W. Bush mirrored this assertion when approving a bill that increased penalties against pedophiles by stating that, "[p]rotecting our children is our solemn responsibility. It's what we must do. When a child's life or innocence is taken . . . it's an act of unforgivable cruelty. Our society has a duty to protect our children from exploitation and danger." Press Release, President Signs H.R. 4472, The Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), available at <http://www.whitehouse.gov/news/releases/2006/07/20060727-6.html>.

163. Missouri Governor Matt Blunt recognized the significance of protecting children when enacting House Bill 1698 by explaining that, "I called for this tough new law because there is no excuse for these crimes and no excuse not to protect our children Today I am sending a message to sexual offenders - stay out of our state, stay away from our children. These crimes will not be tolerated, period." Press Release, Blunt Fulfills Promise; Signs Priority Legislation to Protect Children from Sexual Predators (June 6, 2006), available at <http://www.gov.mo.gov/press/ProtectChildren060606.htm>.

164. See Hansen, *Potential Predators*, *supra* note 76.

165. *Id.*

from the damaging effects that could ultimately result from communication with a sex offender.¹⁶⁶

As the recent circuit court decisions discussed above suggest, Internet sting operations have become the most popular tool used to track down and convict online sexual predators. The decision in *Helder* and the legislation in House Bill 1698 are both highly important to the future success of the Internet sting operations involved in shows like *To Catch a Predator*. Without tools such as sting operations in place to identify sex offenders before they reach their targeted audience, law enforcement would have to resort to “rarely securing a conviction or putting an actual child in harm’s way” in order to catch a pedophile.¹⁶⁷ *Helder* and House Bill 1698 both ensure the continued use of sting operations by law enforcement agents to track down Internet predators before the predators make contact with an actual minor victim. Because law enforcement agents are able to continue the use of sting operations to apprehend sex offenders, investigative television shows, like *To Catch a Predator*, are also able to continue in their efforts to educate the general public of the dangers looming on the Internet and deter possible future pedophiles from seeking sex online.

Despite the established legality of Internet sting operations, the practices used in shows like *To Catch a Predator* still have many critics. These critics have argued that law enforcement agents employ entrapment in detaining the sex offenders through sting operations.¹⁶⁸ Many question whether sting operations entrap “the men by having decoys bring up the subject of sex and later invite the men for a sexual encounter.”¹⁶⁹ Others assert that “[i]t is hard to tell from the program whether the suspects are active predators intent on luring children into offline sexual encounters or kinky fantasists tempted by [the agents] into crossing a line.”¹⁷⁰ Therefore, sex offenders often assert entrapment as a defense to an accusation of attempted enticement of a minor under § 2422(b).¹⁷¹ However, after applying the elements of an entrapment defense to the Internet sting operations employed in *Helder* and *To Catch a Predator*, it becomes clear that entrapment is not a viable criticism of sting operations.

The first element of entrapment, inducement, cannot be satisfied by pedophile-defendants accused of enticing minors over the Internet. Even if the law enforcement officer initiated the contact, evidence that a government agent instigated the sexual conversation with the defendant, “standing alone,

166. See *United States v. Meek*, 366 F.3d 705, 718 (6th Cir. 2000).

167. *Id.*

168. See Posting of Brian Montopoli to Public Eye, <http://www.cbsnews.com/blogs/2006/02/07/publiceye/entry1290135.shtml> (Feb. 7, 2006, 11:20 AM).

169. See *id.*

170. Stanley, *supra* note 5.

171. See Szarvas-Kidd, *supra* note 29, at 44.

is insufficient to constitute inducement.”¹⁷² Because mere solicitation by the government is not adequate to prove entrapment,¹⁷³ it would be difficult for the defendant to prevail on an assertion that he was persuaded to turn “from a righteous path to an iniquitous one,” especially when the pedophile exhibited unlawful propensities by continuing the conversation after discovering the minor’s age.¹⁷⁴ Further, even if the defendant can successfully assert that he was persuaded into the conversation by the government, it is hard to deny that the sex offender had every opportunity to jump back on the “righteous path” by deciding not to take the “substantial step” of traveling to the minor’s home for sex.¹⁷⁵

The second element of entrapment, lack of predisposition, also cannot be satisfied by the defendants. Although law enforcement officers in sting operations may incorporate sex into the conversation, in most cases, the defendant knows the exact age of the “minor” yet continues to pursue a sexual encounter with the child. This pursuit shows that the predisposition of the defendant is not that he is an “unwary criminal.”¹⁷⁶ Instead, the defendant’s knowledge of the minor’s age reveals that the defendant’s intent is to engage in sexual activity with an actual minor, and the undercover agent merely created the opportunity for the predator to fulfill his predisposition. Further, in the case of a repeat sex offender, or under circumstances where child pornography is discovered on the defendant’s computer, predisposition may be inferred from the defendant’s history of deviant sexual conduct.¹⁷⁷ This history, combined with the defendant’s ready response to the inducement, shows that the defendant was “ready and willing” to commit the crime and was, consequently, not entrapped.¹⁷⁸

Since the elements of entrapment cannot be met by the pedophiles apprehended through Internet sting operations, the arguments waged by critics of *To Catch a Predator* are unfounded and probably based on a lack of understanding of the law. Many of these critics overlook the complicated elements that go along with proving an entrapment defense, and fail to realize that it takes more than simple law enforcement involvement to succeed on an entrapment defense.

In addition to asserting the entrapment defense, pedophiles who are the target of sting operations often assert legal impossibility as a defense, just as

172. *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

173. Szarvas-Kidd, *supra* note 29, at 44.

174. *Id.* at 44.

175. Even if the defendant chose not to travel to meet the minor, in cases involving attempted enticement of a minor, defendants are deemed to have taken a “substantial step” under the definition of attempt when they merely solicit the minor’s compliance in a sexual encounter. *Doe v. Smith*, 470 F.3d 331, 345 n. 23 (7th Cir. 2006).

176. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

177. *See Ortiz*, 804 F.2d at 1165.

178. *Id.*

the defendant did in *Helder*.¹⁷⁹ Sex offenders who are arrested as a result of sting operations try to claim legal impossibility by arguing that they “could not have committed a crime because no child actually existed to entice for illegal sexual acts.”¹⁸⁰ Like entrapment, this defense typically fails to be helpful to sex offenders convicted of attempted enticement of a minor under § 2422(b).

Today, the impossibility defense to attempt crimes is being deserted by more and more states.¹⁸¹ Although courts still use the terms “factual impossibility” and “legal impossibility,” “[m]ost federal courts have repudiated the distinction or have at least openly questioned its usefulness.”¹⁸² In cases of attempted enticement of a minor, while defendants argue that their impossibility defense is premised on legal impossibility, both state and federal courts have found that where a defendant was communicating with an undercover officer, the impossibility argument is actually based on factual impossibility, which is not a defense to attempt.¹⁸³ This conclusion is based on the determination that the defendant unquestionably intended to engage in the sexual conduct proscribed by law but failed only because of circumstances unknown to him; the defendant was unsuccessful in committing the crime simply because the defendant was communicating with an undercover agent rather than an actual child.¹⁸⁴

Essentially, in an attempted enticement of a minor case where a sting operation is involved, the pedophile is “trying to pick an empty pocket.”¹⁸⁵ The defendant who was hoping to interact with a child comes up “empty” because the person on the other side of the conversation was an adult, which constitutes a factual impossibility defense, not legal impossibility. Therefore, the legal impossibility defense cannot be applied successfully to cases involving sting operations because, although the defendant could not have actually engaged in sexual conduct with a child, the defendant still intended to engage in illegal conduct. As a result, in attempted enticement cases under §

179. See Szarvas-Kidd, *supra* note 29, at 44; *United States v. Helder*, 452 F.3d 751, 753 (8th Cir. 2006).

180. Szarvas-Kidd, *supra* note 29, at 44.

181. Brodie, *supra* note 20, at 243. To date, at least 20 states have abandoned impossibility as a defense, including Missouri. *Id.* at n. 39; MO. REV. STAT. § 564.011 (2000).

182. *United States v. Farner*, 251 F.3d 510, 512 (5th Cir. 2001). Most courts’ analyses of attempt crimes and impossibility as a defense now focus on establishing the two elements of attempt, and disregard the distinction between factual and legal impossibility. Robert M. Sieg, *Attempted Possession of Child Pornography--A Proposed Approach for Criminalizing Possession of Child Pornographic Images of Unknown Origin*, 36 U. TOL. L. REV. 263, 268 (2005).

183. Szarvas-Kidd, *supra* note 29, at 44.

184. *Id.*

185. BLACK’S LAW DICTIONARY 771 (8th ed. 2004).

2422(b), such as *Helder*, it is extremely unlikely that the defense of legal impossibility will survive judicial scrutiny and analysis.

V. CONCLUSION

The holding in *United States v. Helder* and the legislation in Missouri House Bill 1698 both establish that involvement of an actual minor victim is not required to sustain a conviction for attempted enticement of a minor under 18 U.S.C. § 2422(b).¹⁸⁶ The legal results in *Helder* and House Bill 1698 have important consequences for Missouri's children. By stating that a minor is not required for a conviction, *Helder* and House Bill 1698 ensure that law enforcement agents can continue to use Internet sting operations in their efforts to protect children from contact with pedophiles. In turn, investigative television shows can also continue to use large-scale sting operations to educate the public of Internet dangers and deter future potential sex offenders. As for the critics of Internet sting operations and the defendants hoping to successfully assert defenses to their attempted enticement convictions, claiming entrapment or legal impossibility in response to sting operations is a hopeless task based on ignorance of the law that will ultimately prove to be unsuccessful.

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186. *United States v. Helder*, 452 F.3d 751, 756 (8th Cir. 2006); H.R. 1698, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006).