TO CATCH A PREDATOR? A COMPARATIVE LOOK AT ONLINE SEXUAL PREDATORS & THE DEFENCES MADE AVAILABLE TO THEM

Emir Aly Crowne Mohammed*
&
Stéphane Christopher McRoberts**

Fall 2008

Copyright © University of Pittsburgh School of Law
Journal of Technology Law and Policy

* BA, LLB, LLM, LLM, PhD (cand.), Assistant Professor at the University of Windsor, Faculty of Law.
This paper is dedicated to the Administrative Staff at the University of Windsor, Faculty of Law - Vidya, Balachandar, Rita Cheung, Anne Dawson, Shafqat Hanif, Cathy Milec, Mary Mitchell, Virginia Obierski, Diane Pastorius, Annette Pratt, Norman Saxon, Thuy-Binh Shiu, Debbie Squillaro, Sandra Stein, and Yvonne Zimmerman.
** BA, LLB, Articling Student. The Law Offices of David Berg & Gerald Logan Criminal Defense.

Table of Contents

I. Introduction..3

II. Police Sting Operations: Taking the ‘Sting’ Out of Them ……………………………4

A. The Law of Entrapment in the United States..5

B. The Law of Entrapment in Canada..8

III. Fantasy/Role Playing..12

IV. Justice Perverted...13

V. Conclusion...18

I. INTRODUCTION

For online sexual predators,[1] the Internet is a tool that not only enables them to locate potential victims, but also allows them to remain relatively anonymous. Since most of the encounters between a child and an online predator occur in chat rooms,[2] their names and identities are usually substituted with an onscreen name, typically a pseudonym of some sort.[3]

Online predators can generally be classified according to the following four (4) major categories: travelers, collectors, manufacturers and chatters.[4] With respect to online sexual predators, travelers represent the most serious threat since they are willing travel to meet the child (sometimes even across state, provincial or international borders).[5] Collectors and manufacturers also represent a serious societal concern, as they are principally involved with the production, collection, and distribution of online child pornography.[6] While collectors ordinarily have no desire to meet children, manufacturers have a vested interest in seeking out vulnerable children.[7] Finally, chatters are a group of predators that have absolutely no interest in meeting the child, but prefer to have sexually explicit conversations online or, in some cases, through the phone. [8] Fantasy is more important than reality to this group of predators.

---

[1] The authors shall use the phrase "sexual predators" to refer to those accused of being a sexual predator, as well as those convicted of the offence. The equivocation is intentional, since the presumption of guilt is engendered by the media and 'popular' opinion.

[2] M. Megan McCune, Comment, *Virtual Lollipops and Lost Puppies: How Far Can States Go To Protect Minors Through the Use of Internet Luring Laws*,14 COMMLAW CONSPECTUS 503, 512-13 (2006).

[3] MARK A. SMITH & PETER KOLLOCK, IDENTITY AND DECEPTION IN THE VIRTUAL COMMUNITY 35 (1998).

[4] McCune, *supra* note 2, at 511.

[5] *Supra*, note 2.

[6] *Id*. at 511-12.

[7] *Id*.

[8] *Id*. at 512.

The luring process, otherwise known as the befriending process, is crucial because it represents the period in which the online predator attempts to build a relationship with the potential victim.[9] While conversations in the beginning can involve innocent questions such as asking the child's favorite sport or movie, they can quickly escalate to discussions of sexual desires and preferences.[10] The luring process can be neatly summed up as follows:

> The offender will use a child's online profile to learn of the child's likes and dislikes and will then portray many of these same characteristics. In addition, sexual predators will ask the child a number of personal questions when they first meet to learn about the minor's insecurities... The purpose of the courting period is to groom the child for sexual activities and to form a relationship with the child.[11]

II. POLICE STING OPERATIONS: TAKING THE 'STING' OUT OF THEM

The anonymity of the Internet is often touted as one of its greatest boons. Unfortunately, it also presents a serious problem for apprehending online predators. The actual act meeting of child and predator is an activity to which both parties notionally 'agree;' [12] this makes it enormously difficult to detect online predators without excessive surveillance. As a result, many police forces across the United States and Canada are now conducting chat room sting operations in order to catch the online predators: "Agents… exploit the anonymity of the Internet to **impersonate** young adolescents **willing** to meet up with strangers for a sexual rendezvous."[13]

To disguise themselves as a child or adolescent, the agents will generally edit their online profile so that it indicates the appropriate age as well as the typical interests

---

[9] *Id*. at 512-513.
[10] *Id*.
[11] *Id*. at 513.
[12] Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 67 (2005).
[13] *Id.* (emphasis added).

and hobbies of a young boy or girl.[14] Upon entering the chat room, the agent will also wait until the potential predator initiates the conversation.[15] At some point during the conversation, the agent, while pretending to be a child, will state their fictitious age to the potential offender. This is done for evidentiary reasons so that no doubt exists as to whether the offender was aware that the user with whom they were chatting was a minor.[16]

A. THE LAW OF ENTRAPMENT IN THE UNITED STATES

With the growing number of alleged online predators are arrested through online police sting operations, a common concern for prosecutors is the availability of the entrapment defense. In *Sorrells v. United States*, the U.S. Supreme Court summarized the nature and philosophy behind the defense: "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offence and induce its commission in order that they may prosecute."[17] As a result, most courts will concern themselves with the accused's predisposition in deciding on the issue of entrapment. In a series of cases, the Supreme Court created a rule that would obligate all federal courts to focus on the predisposition of the accused in order to determine whether or not the accused would have committed the crime without the involvement or inducement of the police.[18] The test employed by the Supreme Court is known as the "subjective test," since the focus is on the alleged

---

[14] *Id.* (citing Donald S. Yamagami, Comment, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown In A Virtual World In Light Of The Fantasy Defense?,* 41 SANTA CLARA L. REV. 547 (2001)) .
[15] *Id.*
[16] *Id.*
[17] 287 U.S. 435, 442 (1932).
[18] Stevenson, *supra* note 12, at 9-10.

criminal's state of mind rather than the tactics of the police.[19] A dissenting minority of the Supreme Court, however, felt that the focus should not entirely be on the accused but instead should also consider the conduct of the police during the course of their sting operation.[20] As a result, an objective test, which centered around police activities, was also introduced into the jurisprudence.[21] The justification for this test was that it would permit courts to continually expand on the appropriateness of police tactics.[22] Some states, such as Florida, have adopted this test, and thus employ both the objective and subjective tests in deciding on the defense of entrapment.[23]

With respect to sting operations geared to apprehending online predators, one of the key elements for the availability of the defense is the identification of which party (i.e. the police or the alleged pedophile) who first initiated the conversation. As noted earlier, this will be of particular significance with respect to the objective test. As for the subjective test, the courts will examine the transcripts of the chats to better understand the mindset and intentions of the predator.

On the surface, entrapment may very well represent a viable and legitimate defense against online sting operations. However, New York courts (which are typical of other State and Federal courts) shows otherwise; as entrapment has had very little success as a defense (irrespective of whether Courts employ a subjective or objective test, the defense of entrapment has almost consistently been rejected by the courts). In *People v.*

---

[19] *Id*. at 9-10.
[20] *Id*. at 10-11.
[21] *Id*. For a more complete discussion of this topic, see, for example, Dru Stevenson*, Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 97 (2004). *See also*, Kenneth M. Lord, *Entrapment and Due Process: Moving Toward A Dual System of Defenses*, 25 FLA. ST. U. L. REV. 468, 473-74 (1998) ("In addition to the federal courts, about thirty-seven states have followed the Supreme Court's lead by incorporating a subjective inquiry into the entrapment defense, while only thirteen states have adopted some form of objective entrapment.")
[22] *Id*. at 11.
[23] *Id*. at 11-12. *See also* Stevenson, *supra,* note 21.

Moultrie, the court employed the objective test and found that the defendant failed to prove entrapment because there was no possible way to view the evidence that could demonstrate that the accused was actively induced to commit the crime.[24] In *People v. Delaney*, the court rejected the defense because there was no evidence that the officer actively persuaded the defendant to engage in the transaction.[25] And with respect to the subjective test, in *People v. Castro*, the court rejected the defense of entrapment because of the finding that the accused was predisposed to commit the offence.[26]

While both the subjective and the objective tests can be effective in their own ways, it is also important to understand the need of courts to utilize both of these tests since they complement each other. While the subjective test aims at recognizing the predisposition of the accused, which is certainly relevant in assessing a defense of entrapment, it can bring all prior convictions of the accused into play and thus be unfairly prejudicial to the jury.[27] And, while the objective test avoids addressing any past crimes of the accused, it does have the potential of releasing a dangerous offender solely because of aggressive or imprudent police tactics.[28] On this basis, an accused who has a criminal history of being an online offender can be acquitted by the objective test by successfully making a case for entrapment.[29] Therefore, both tests should be utilized since they balance the inequities of each approach. The predisposition and actions of the accused should be weighed against the conduct of the police.

---

[24] 5 A.D.3d 241, 242 (N.Y. App. Div. 2004).
[25] 309 A.D.2d 968, 976 (N.Y. App. Div. 2003).
[26] 299 A.D.2d 557, 558 (N.Y. App. Div. 2002).
[27] Stevenson, *supra* note 12, at 12.
[28] *Id*.
[29] *Id*.

Nonetheless, the defense has had very little success in the United States. Interestingly, where the defense does succeed, there is usually no written decision issued to confirm the role of entrapment; however, the general consensus is that "it is rarely raised and that it rarely succeeds."[30]

B. THE LAW OF ENTRAPMENT IN CANADA

In Canada the test for entrapment is more oriented towards the conduct of the police rather than the predisposition of the accused. This is similar to the objective test in the United States. In *R. v. Mack,* the Supreme Court of Canada held entrapment occurs when

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry; [and] (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.[31]

Although *Mack* dealt with a sting operation aimed at drug trafficking, the Court did outline the various factors that need to be considered when assessing the defense of entrapment.[32] These factors include:

1) the persistence and number of attempts made by the police before the accused agreed to committing the offence;

2) whether police conduct involved an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;

3) whether an average person, with the strengths and weaknesses of the accused would be induced into the commission of a crime;

---

[30] *Id*. at 15.
[31] *R. v. Mack*, [1998] 2 S.C.R. 903,¶ 133-35.
[32] *Id.* ¶ 133, 138-149.

4) the type of crime being investigated; and

5) the availability of other techniques for the police detection of its commission.[33]

Indeed, the Canadian *Criminal Code* was amended in 2002 to specifically address the issue of online luring.[34] Section 172.1 of the *Criminal Code* makes it an offence for anyone to use a "computer system" to communicate with someone under eighteen to facilitate sexual exploitation, sexual assault, or procure sexual intercourse (*inter alia*).[35]

Despite the abundance of jurisprudence involving undercover police officers' posing as minors in online chat rooms,[36] no Canadian Court has specifically considered the defense of entrapment. Undoubtedly, the Supreme Court's affirmative remarks in *R. v. Sharpe* on the importance of protecting and preventing harm to children,[37] and the

---

[33] *Id.* ¶ 138-149.
[34] Canada Criminal Code, R.S.C., ch. C 46 (1985)
[35] *Id*. at § 172.1. The provision also has further restrictions against the use of a "computer system" to communicate with persons under the age of fourteen for the purposes of facilitating sexual interference, sexual touch or other indecent acts. *See also,* Luring a Child via the Internet, http://www.duhaime.org (follow "Criminal Law" link; then follow "Luring a Child via the Internet" hyperlink).
[36] *R. v. Fisher*,[2007] 317 N.B.R.2d 317; *R. v. Folino*, [2005] 203 O.A.C. 258; *R. v. Jarvis*, [2006] 214 O.A.C. 189; *R. v. Jepson*, [2004] O.J. No. 5521; *R v Randall*, [2006] 247 N.S.R.2d 29.
[37] [2001] 194 D.L.R.4th 1, ¶ 91, McLachlin C.J. states:

> The evidence is clear and uncontradicted. "Sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process" (para. 23). The ability to possess child pornography makes it available for the grooming and seduction of children by the possessor and others. Mr. Sharpe does not deny that some child pornography can play an important role in the seduction of children. Criminalizing the possession of child pornography is likely to help reduce the grooming and seduction of children.

L'Heureux-Dubé, Gonthier and Bastarache JJ. noted in their concurring judgment that:

> "Child pornography is especially valuable to paedophiles. Dr. Collins defined paedophilia in these terms: "Paedophilia is a form of paraphilia. Paraphilia very simply is the clinical term denoting sexual deviance. . . . [Paedophilia] is the erotic attraction or the sexual attraction to pre-pubescent children". Paedophiles tend to use child pornography in two primary ways. First, representations of children as sexual objects or engaged in sexual activity are used to reinforce the opinion that children are appropriate sexual partners; these cognitive distortions are then used to justify paedophilic acts. Second, many paedophiles show child pornography to children in order to lower their inhibitions towards engaging in sexual activity and to persuade them that paedophilic activity is normal; see Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (1984) ("Badgley Report"), vol. 2, at p. 1209.

legislative changes to the *Criminal Code*, speak to society's contempt and scorn for those who exploit minors (directly or indirectly). However, the concept of justice is a confection that has many flavors, and the mere fact that entrapment has never been raised by defense counsel suggests that predators may not be receiving an adequate, let alone a "full and fair" defense.

To support a claim of entrapment, one might argue that an individual should have a reasonable expectation of interacting with adults in an "adults only" chat room. This might give substance to the argument that the accused did not truly believe that he was chatting with a child, since he was in an adults only chat room. However, this argument has proven to be extremely weak since the transcripts of the chat often prove to be effective evidence against the accused.[38] Thus, it becomes apparent that, although it was an adults only chat room, the accused was made aware on several instances that he was chatting with a child. Moreover, given the fact that these crimes will generally go unreported, coupled with the anonymity the Internet provides an offender, courts may find that the police are left with no other recourse for investigating these types of offences, a factor outlined in *Mack*.[39]

> It should be emphasized that some of the material in the respondent's possession was on computer disk and capable of instantaneous distribution, creating a risk that this material might in fact be disseminated. The widespread availability of computers and the Internet has resulted in new ways of creating images, and has facilitated the storage, reproduction, and distribution of child pornography. Detective Waters likened this increased distribution to a tidal wave. As stated in Criminal Intelligence Service Canada's *Annual Report on Organized Crime in Canada* (2000), at p. 13: "The distribution of child pornography is growing proportionately with the continuing expansion of Internet use. Chat rooms available throughout the Internet global community further facilitate and compound this problem. The use of the Internet has helped pornographers to present and promote their point of view." Criminalizing the possession of child pornography may reduce the market for child pornography and decrease the exploitative use of children in its production."

[38] *See* Perverted Justice Convictions, http://www.perverted-justice.com/?con=full (last visited Feb. 17, 2009) (containing the full archives of convictions resulting from Perverted-Justice's online chats).
[39] *R. v. Mack*, [1988] 2 S.C.R. 903, ¶13 ("the type of crime being investigated and the availability of other techniques for the police detection of its commission").

The issue of conducting an online sting operation in an adults only chat room might bring about a defense of entrapment if one adopts the sole dissenting opinion of Justice McLachlin in *R. v. Barnes*.[40] In her dissent, Justice McLachlin first states the *Mack* entrapment definition:

> The defense of entrapment is available where the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry.[41]

In *Barnes*, the issue was the location at which the police had conducted their sting operation:

> The question is whether the interception at the particular location where it took place was reasonable having regard to the conflicting interests of private citizens in being left alone from state interference and of the state in suppressing crime. If the answer to this question is yes, then the inquiry is bona fide.[42]

In this case, the dissent posits there was no evidence tracking took place at the location of the undercover interception in this case.[43] Essentially, the police must reasonably suspect that criminal activity is occurring in the location in which they are conducting the sting operation. According to Justice McLachlin, conducting a sting operation in an entire mall seems overly broad and thus, has the potential of constituting entrapment. Instead, police need to be much more specific in the locations they choose to conduct these investigations. More importantly, there needs to be a reasonable suspicion that criminal activity is occurring in these particular locations.

Therefore, in cases where the "sting" is conducted in adults only chat rooms (like *Randall*), there is a conceptual difficulty in alleging that police have some sort of

---

[40] *R. v. Barnes*, [1991] 1 S.C.R. 449 (Justice L'Heureux-Dubé also dissented, but only in part).
[41] *Id*.
[42] *Id*. ¶ 80.
[43] *Id*. ¶ 84.

reasonable suspicion that criminal activity involving minors was occurring in a chat room specifically targeted at adults only. Of course, Justice McLachlin was merely expressing a dissenting view in *Barnes*. Perhaps, in her current role as Chief Justice she will be more influential should the matter of online entrapment ever reach the Supreme Court.[44] But at the very least, this is an issue that is ripe for some sort of judicial scrutiny, at any level of court.

III. FANTASY/ROLE PLAYING

Another possible defense that can be raised is the fantasy/role playing defense. This defense is a direct result of the "Internet culture," a culture that has facilitated "...a virtual environment in which it is acceptable for utter strangers to carry out sexual fantasies in online chat rooms featuring themes such as submission, dominance, incest, fetishes, and homosexual fantasies."[45]

The defense implies that the accused never actually believed that they were speaking with a child or adolescent. Instead, they were under the impression that they were chatting with an adult, engaged in a "mutual, role playing fantasy with that person."[46] This expectation stems from the fact that the accused was conversing in a chat room labelled, for example, for adults only. This argument is akin to the notion of having a reasonable expectation that all conversations in an adults only chat room are with adults, rather than children. Although it may be difficult to successfully advance this argument, the fantasy/role playing defense has had some success particularly in cases

---

[44] Even if the Supreme Court were to adopt this view, it would need to be weighed against the factors outlined by the majority in *Mack*.
[45] Elizabeth D. Tempio, *Issues in the Third Circuit: The Third Circuit Takes A Hard Line Against Child Predators in* United States v. Tykarsky, 52 VILL. L. REV. 1071, 1090-91 (2007). *See also*, Donald S. Yamagami, *supra* note 14, at 562.
[46] *Id*. at 1091.

where the alleged offence is to have taken place in a chat room with a name "indicative of role playing" or simply restricted to adults.[47] This was the case for Patrick Naughton, a man arrested for using the Internet to arrange to try to have sex with a minor. Naughton was alleged to have induced a minor online in an adults only chat room entitled "dad&daughtersex."[48] Naughton used the fantasy/role playing defense and argued that he thought he was meeting an adult woman who shared in his "daddy/daughter" role playing fantasy.[49] Seven jurors convicted Naughton of crossing state lines with intent (to have sex with a minor), while five found him not guilty. Six of the jurors also found him guilty of using the internet to entice a minor (to have sex), while five found him not guilty. The judge declared a mistrial on these counts, but convicted Naughton for possession of child pornography. In the end, Naughton struck a deal with the FBI to write software for them and received a light sentence, and ultimately served no prison time for his felony.[50]

IV. JUSTICE PERVERTED

While the police are gradually conducting more and more online sting operations, some departments lack the resources and manpower to employ these investigational methods on a regular basis. As a result, an organization has surfaced in the United States known as Perverted-Justice, consisting of private citizens hoping to apprehend online predators through their own private Internet sting operations. Perverted-Justice seems to have gained recognition from the general public as one of the main private combatants in

[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] Yamagami, *supra* note 14, at 562.

the fight against online predators and pedophilia.[51] This online "watchdog" group aims at not only catching online predators but identifying and ultimately humiliating them in public, on television and through their Web site:

> Perverted Justice is an organization that is dedicated to exposing adults who use the Internet to seek sexual activity with children. The modus operandi of the organization is to have members pose as young children in Internet "chat rooms" and wait to be contacted by adults that engage them in a sexual dialogue. The organization often involves law enforcement and also may publish information about the adult, including the sexually explicit chat, on the Internet."[52]

Perverted-Justice conducts many of its Internet sting operations privately, without the aid of police. Once Perverted-Justice has concluded its investigation, the organization will then contact the police to report the alleged online predator and provide evidence, mainly the transcripts of the online chats.[53] As a result, prosecutors can circumvent the defense of entrapment because there is no legal defense of entrapment from private individuals.[54] In other words,

> [T]here is no defense of private entrapment when the individual who induces the defendant is acting **purely** as a private citizen, **not on behalf of the government**. This rule is accepted by virtually every Court in the United States, with little challenge.[55]

---

[51] Perverted-Justice's most prominent collaboration has been with Dateline NBC, a national television show that aired the arrests of the alleged predators. As stated in *Conradt v. NBC Universal, Inc.*:

> In 2004, Dateline began producing and broadcasting a series of segments entitled "To Catch A Predator"...Working with Perverted-Justice and local police departments, Dateline uses "decoys" posing as teenagers on-line to "lure", with the promise of sex, individuals suspected of being sexual predators to a "sting house". There, the decoy -- who is an adult actor posing as a young teenager supposedly alone at home -- invites the individual into the house. After a few moments, the decoy leaves and the host of the show, NBC correspondent Chris Hansen, appears. Hanson confronts the individuals and starts asking questions.

536 F.Supp.2d 380, 384 (S.D.N.Y. 2008).

[52] United States v. Kaye, 451 F.Supp.2d 775, 777 (E.D. Va. 2006).

[53] Perverted-Justice Frequently Asked Questions, http://www.perverted-justice.com (click "FAQ" hyperlink).

[54] Stevenson, *supra* note 12, at 3 (emphasis added).

[55] *Id*.

However, since some of Perverted-Justice's investigations are conducted with the help of the police,[56] the argument could be advanced that the organization is not acting purely as a private citizen. There is clearly some sort of agency relationship present. Nevertheless, a defense of entrapment against Perverted-Justice has yet to be made. A fact that the organization is keen to promote:

> …are the files we post "entrapment?" No. Not on any level. These people IM our names first. We don't IM them. They choose to say the things they say, to agree to the things they agree to, and to give their phone number for the verification call.
>
> Entrapment is a situation where you go out of your way to entice a citizen as law enforcement to commit a crime they otherwise would not commit.
>
> For example, if a department sent around female police pretending to be prostitutes to knock on the doors of private citizens offering sex, that's entrapment.
>
> We don't do the figurative "knocking on doors." Rather we sit, wait, and allow them to knock upon our online "door." And when they do, they're in for a surprise. As the law states regarding entrapment, the defense fails when it can be shown that the person being charged had a predisposition to the crime in question.
>
> Anyone who knows the law will never make the entrapment argument towards these crimes, because people who know the law understand that these people are predisposed to commit these crimes. *It's why they hit us up to begin with*. Hundreds upon hundreds of convictions... zero successful entrapment defenses. **Zero**."[57]

While Perverted-Justice's explanation makes reference to both the predisposition of the accused and the group's tactics when conducting their investigations (i.e. the objective and subjective limbs of the entrapment test), their explanation of the defense of entrapment lacks legal precision. It is mere puffery.

---

[56] Perverted-Justice Frequently Asked Questions, http://www.perverted-justice.com (click "Info For Police" hyperlink).

[57] Perverted-Justice Frequently Asked Questions, http://www.perverted-justice.com (click "FAQ" hyperlink) (emphasis in original).

As a private organization, Perverted-Justice lacks the oversight, training, accountability and candour that are essential to the equivalent investigations conducted by law enforcement. One could regard their actions as those of a vigilante group. While the goal of apprehending online predators is one shared by many (and is indeed laudable), their means are questionable.

In *United States v. Kaye*, the defendant argued that the indictment should be dismissed for spoilation of evidence:

> Kaye also argues the district Court erred in denying his motion to dismiss the indictment for spoliation of evidence because Perverted-Justice's failure to record a telephone conversation between Shea and Kaye prevented Kaye "from playing the true, complete and accurate telephone conversation and proving that he was led to believe, by the speaker's voice, that he was speaking with an adult.[58]

Perverted-Justice never accounted for their failure to record the telephone conversation with the accused. However, the Court found this argument to be meritless.[59] Moreover, the court rejected the argument that Perverted-Justice's failure to record the conversation denied Kaye due process since the group is composed of private individuals, and not law enforcement.

Although the court found no substance in Kaye's argument, Perverted-Justice's actions should nonetheless raise some concern. The group may be composed of private citizens, but it is seemingly performing the same role as law enforcement. Yet, because they are a private organization, their tactics are not subject to the same level of scrutiny that the Courts, regulatory bodies and other oversight agencies apply to law enforcement. Indeed, Perverted-Justice has the potential to conduct investigations that should normally give rise to the defense of entrapment. Perverted-Justice, and the law enforcement

---

[58] *United States v. Kaye*, 243 Fed. Appx. 763, 767 (4th Cir. 2007).
[59] *Id*.

agencies that directly or indirectly rely upon their services are artificially, and inequitably, depriving predators of a full and fair defense.

For example, in 2006, while conducting an online sting operation, Perverted-Justice encountered Louis William Conradt, Jr., an Assistant District Attorney in Texas.[60] While Conradt and the decoy from Perverted-Justice were engaged in a sexually explicit online chat, it should be noted that the decoy for Perverted-Justice made several attempts, all unsuccessful, at enticing Conradt into going to the decoy's house.[61] Conradt had stopped responding to the decoy's messages.[62] Nevertheless, Perverted-Justice continued to initiate contact with Conradt.[63] Had it been police conducting the investigation, a defense of entrapment might have been advanced. Moreover, one could advance the argument that in initiating a conversation with Conradt, an individual with no criminal record, Perverted-Justice clearly was not concerned with the predisposition of the individual. Rather, it seems as though the organization would rather apprehend those who will garner the most publicity, such as an Assistant District Attorney.

Therefore, with this type of police involvement it is difficult to find that there is no agency relationship between the police and Perverted-Justice. It would be inequitable and prejudicial for a court to hold that an alleged predator could not raise the defense of entrapment merely because Perverted-Justice (or a similar type of private entity) was involved. Even if the law enforcement body in question was unaware of Perverted-Justice's private sting operations, and subsequently benefited from the information gained from such operations, it would be an artificial and unjust circumvention of the

---

[60] Conradt v. NBC Universal, Inc., 536 F.Supp.2d 380 (S.D.N.Y. 2008).
[61] Luke Dittrich, *Tonight on* Dateline *This Man Will Die*, ESQUIRE. Sept. 1, 2007, at 232, 237.
[62] *Id*.
[63] *Id*.

defense of entrapment. On either limb the defense should be permitted by the courts, anything less *would be* perverted justice.

V. CONCLUSION

In the end, investigating and apprehending online sexual predators can prove to be an extremely difficult task because of the anonymity that the Internet provides. The protection of children and their well being is an important societal interest that is not to be underscored, even in academic literature.

Due to the anonymity and shame/guilt that children who have been the victims of online exploitation may experience, many of these crimes go undetected. As a result, law enforcement has (rightly) taken a more proactive approach in investigating these crimes. Thus, undercover online sting operations can certainly prove to be an effective tool in apprehending online predators. The issue, however, then becomes whether or not police are constructively pursuing individuals that have the predisposition of committing such crimes or are merely arresting individuals who would not have committed such crimes had there been no undercover operation. Essentially, the issue is whether police are entrapping individuals when conducting online sting operations.

Although the legal defense of entrapment has been around long before the use of Internet sting operations, there still remains a bit of uncertainty as to the true intentions of the accused. As opposed to an undercover operation aimed at drug trafficking, the burden for police and prosecutors becomes whether or not they can effectively demonstrate that the accused was in fact attempting to lure the child. With drug trafficking, the individual is practically caught in the act, either selling or purchasing narcotics from an undercover police officer. However, with Internet sting operations, the

accused's mindset or predisposition is crucial, because his words in an online chat may not necessarily be indicative of his true intentions. He may simply be role playing. And while Canadian courts have yet to deal with the defense in this context, the American jurisprudence seems to have embraced the police's use of online sting operations in apprehending sexual predators and shunned the defense of the entrapment.

However, jurisprudence from both countries suggests that the courts regard the transcripts of the chat as valuable evidence. And in a large majority of cases, these transcripts will serve as evidence that go against the accused.[64] Moreover, the courts seem to recognize the difficulty in policing these types of crimes. Thus, online sting operations appear to provide a practical solution to the problem, despite the noticeable access to justice issues that arise.

It is important to recognize that some of these sting operations may give rise to a legitimate defense of entrapment, irrespective of how vile we consider child predators to be. Whether it is the fact that police have initiated conversation with the offender or that police have conducted their investigation in a chat room reserved for adults only, one can submit that some elements of the defense have at least been borne. The courts may show some deference to law enforcement as to the precise manner in which police conduct their *own* online sting operations. However, the delegation of these sting operations to organizations outside of law enforcement is particularly damaging to the integrity of the justice system.

[64] *R. v. Mack*, [1988] 2 S.C.R. 903 ¶133.