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The Jurisdictional Entrapment Defense:  
An Analytic Framework for Claims of Manufactured Jurisdiction in Child Exploitation Prosecutions

Leonid Feller

INTRODUCTION

The federalization of criminal law, which began after the Civil War and has continued unabated to the present day, has resulted in offenses of historically local concern being placed squarely under national jurisdiction. Starting with the Post Office Act\(^3\) and the Sherman Act\(^4\) in the late nineteenth century, developing through the Mann Act\(^5\), the Lindbergh Act\(^6\), and the National Firearms Act\(^7\) in the early twentieth century, and accelerating in the Organized Crime Control Act\(^8\) and the Comprehensive Drug Abuse Prevention and Control Act\(^9\) of the 1970s,\(^10\) the federal

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2 See Kathleen F. Brickey, Criminal Mischief: The Federalisation of American Criminal Law, 46 HASTINGS L.J. 1135, 1137 (1995). Professor Brickey recounts that at the founding, the sum total of the federal criminal power expressly allotted to Congress was contained within a single section of the Constitution, empowering the legislature to punish "counterfeiting . . . , Piracies and other Felonies committed on the high Seas, and Offenses against the Law of Nations;" U.S. CONST. art. I, § 8, cl. 10; see also Thomas J. Maroney, Fifty Years of Federalisation of Criminal Law: Sounding the Alarm or "Crying Wolf?" 50 SYRACUSE L. REV. 1317, 1319-29 (2000) (recounting the history of federal criminal law). In addition, Article III empowered Congress to "declare the Punishment of Treason . . . ." U.S. CONST. art. III, § 3, cl. 2.


4 Sherman Act, ch. 647, 26 Stat. 209 (1890).


10 Maroney, supra note 2, at 1327. (quoting Task Force on Federalisation of Criminal law, ABA, Report on the Federalisation of Criminal Law 7 (1998))("[M]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.")
government has steadily chipped away at "the bedrock premise that the states carry the primary responsibility for criminal justice policy." The most recent and perhaps dramatic manifestation of this phenomenon is the passage of legislation and the enactment of executive policy directives vastly expanding the scope of federal jurisdiction in prosecuting crimes against children. These prosecutions threaten encroachment by federal agents on "the sensitive relation between federal and state criminal jurisdiction."  

Whether the federalization of criminal law is a salutary public policy development is the subject of heated debate. But beginning in 1903 with its decision in Champion v. Ames (The Lottery Case), and with rare exceptions such as United States v. Lopez and United States v. Morrison, the United States Supreme Court overwhelmingly has affirmed Congress's use of its Commerce Clause authority to expand federal criminal powers. To date, the circuit courts of appeals have followed suit in the child exploitation arena.

With the grant of increased jurisdictional authority, as well as augmented resources, law enforcement efforts to combat crimes against children have focused principally on three areas: (1) the production, distribution, and

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13 Critics of the expansion of federal criminal powers "point to its unrelenting growth; the political and institutional incentives that drive the persistent passage of new crime legislation; the increasing severity of associated sanctions; and the fact that the federal criminal law already encroaches on the province of state criminal law in indefensible ways." William S. Laufer & Alan Strudler, Why Punish? Corporate Crime and Making Amends, 44 Am. Crim. L. Rev. 1307, 1318 n.2 (2007); see also Barkow, supra note 11 at 124 (arguing "[b]ecause of the many advantages of the states' control over crime, the federal role in criminal law enforcement should be limited to those areas in which it has a decided advantage over the states, such as when crimes are truly national in scope or when state regulation would impose externalities on other states").
17 See U.S. Const. art. I, § 8, cl. 1.
18 See, e.g., Gonzales v. Raich, 545 U.S. 1, 9 (2005) (upholding the Controlled Substances Act as applied to local marijuana growers).
receipt of child pornography;\(^\text{20}\) (2) interstate (or international) travel for purposes of sex with minors;\(^\text{21}\) and (3) sex trafficking of children (i.e. child prostitution).\(^\text{22}\)

In all three spheres, the principal investigative technique used by law enforcement is the “sting,” an undercover operation in which agents pose as wrongdoers to gather evidence and thereby apprehend criminals.\(^\text{23}\) In the ordinary case, a child pornography investigation begins with the seizure of a host computer, putting databases in law enforcement’s hands. This action allows for the identification of tens of thousands of potential targets, whose names appear on subscriber and customer lists, and who are then ensnared by law enforcement fronts soliciting orders for prohibited images.\(^\text{24}\) Similarly, “traveler” cases typically start with a sex tourist unwittingly making contact with either an undercover travel Web site\(^\text{25}\) or an agent posing as a parent, selling a son or daughter for sex.\(^\text{26}\) Child prostitution rings are infiltrated most commonly when officers acting as “johns” locate minors working as escorts, often leading to the arrest of the ringleaders.\(^\text{27}\)

In prosecuting child predators, it remains necessary that federal authorities establish at least some jurisdictional connection sufficient to warrant federal charges. The lack of any federal nexus, after all, is necessarily a bar to prosecution in the national courts. In light of an


\(^{21}\)\hspace{1em} 18 U.S.C. §§ 2423(b), (c) (2006).


\(^{24}\)\hspace{1em} “Operation Emissary,” a 2005 sting run by Immigration and Customs Enforcement, has resulted in at least 260 arrests in forty-four states, including about a dozen defendants who have been previously convicted of sex offenses against minors. See Andrea Alexander, Cub Scout Leader Faces Child Porn Charge, THE RECORD (BERGEN COUNTY, N.J.), Dec. 29, 2007, at A03.

\(^{25}\)\hspace{1em} See United States v. Mayer, 503 F.3d 740, 745–47 (9th Cir. 2007).


\(^{27}\)\hspace{1em} See John Diedrich, Craigslist Child Sex Ads Lead to Arrests, MILWAUKEE J. SENTINEL, Apr. 9, 2008, at A1.
expansive congressional mandate, however, the greater threat to federalism is not the absence of jurisdiction, but rather, overreaching by agents. This overreaching results in the artificial manufacturing of jurisdiction so as to bring defendants, whose crimes implicate exclusively state and local concerns, into federal court. First recognized thirty-six years ago,\(^8\) the manufactured jurisdiction defense—the contours and availability of which have been the subject of a long-running circuit split—threatens to become a staple of child exploitation prosecutions.

This article examines the applicable jurisprudence, considering claims of manufactured jurisdiction (which may better be referred to as "jurisdictional entrapment"), and creates a framework for the doctrine’s application to law enforcement’s present-day efforts to combat child exploitation. Following this Introduction, Part I summarizes the recent expansion of federal jurisdiction over crimes against children and the increased resources available to prosecute those crimes. Part II reviews the body of existing case law considering manufactured jurisdiction—from the doctrine’s inception in United States v. Archer\(^9\) in 1973, its retrenchment in the 1980s and 1990s, and its evolution in United States v. Wallace\(^3\) to a tripartite arrangement of government conduct defenses—alongside entrapment and due process outrageousness. Part III examines the handful of appellate cases considering manufactured jurisdiction specifically in the child exploitation context and studies a sample of recent stings by law enforcement agents around the country. Part IV concludes by developing a set of guideposts for law enforcement to apply in engineering future undercover operations in order to protect against claims of jurisdictional entrapment.\(^3\)

\(^29\) Id.
\(^31\) It is worth noting at the outset two issues that bear some relationship to the design of child exploitation stings in general, and manufactured jurisdiction in particular, but that are not addressed beyond this note, principally because there is no significant jurisprudential dispute about their resolution. The first concerns the permissible use of fictitious child "victims" developed by federal agents as part of elaborate ruses to ensnare sex predators. The federal circuit courts have been unanimous in holding that the absence of a genuine minor is no bar to prosecution or conviction. See, e.g., United States v. Kelly, 510 F.3d 433, 441 (4th Cir. 2007); United States v. Hicks, 457 F.3d 838, 841 (8th Cir. 2006) (holding that "a defendant may be convicted of... travelling in interstate commerce with the purpose of engaging in criminal sexual conduct with a person believed to be a minor regardless of whether such person is actually a minor"); United States v. Tykarsky, 446 F.3d 458, 469 (3d Cir. 2006) (same); United States v. Sims, 428 F.3d 945, 959–60 (10th Cir. 2005) (same); United States v. Vail, No. 03-10147, 2004 WL 1257695, at *1 (9th Cir. June 7, 2004) (same); United States v. Root, 296 F.3d 1222, 1231–32 (11th Cir. 2002) (same).

The second relates to the constitutionality of a statute that prohibits not a completed sex crime, or even the attempt to commit one, but the act of traveling with the prohibited purpose of later committing an illegal act. The law at issue provides that "[a] person who travels in
I. THE EXPANSION OF FEDERAL JURISDICTION AND RESOURCES TO COMBAT CHILD EXPLOITATION


The past decade, however, has brought with it a mammoth expansion of both the number of federally prosecutable child exploitation offenses and the resulting penalties. The Protection of Children from Predators Act of 1998 added interstate coercion, enticement, and shipment of obscene material to minors as federal crimes, as well as increased penalties for the interstate transportation of minors, child pornography, and repeat offenders. The Victims of Trafficking and Violence Protection Act of 2000 extended federal jurisdiction over child prostitution to include any case "in or affecting interstate commerce." The 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act eliminated the statute of limitations, mandated a supervised release term of

interstate [or foreign] commerce ... for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." 18 U.S.C. § 2423(b) (2006). Thus, the statute punishes a state of mind when combined with an act – interstate travel – sufficient to trigger a jurisdictional nexus, even in the circumstance of an undercover sting where the target's intent is aimed at a non-existent minor. See Julie Buffington, Note, Taking the Ball and Running With It: U.S. v. Clark and Congress's Unlimited Power Under the Foreign Commerce Clause, 75 U. CIN. L. Rev. 841, 846-49 (2006). Here, too, the federal courts have spoken with a single voice, rejecting constitutional challenges to the travel statute. See, e.g., United States v. Hawkins, 513 F.3d 59, 60-61 (2d Cir. 2008); Tykarsky, 446 F.3d at 469; United States v. Frank, 486 F. Supp. 2d 1353, 1355 (S.D. Fla. 2007); United States v. Brockdorff, 992 F. Supp. 22, 25 (D.D.C. 1997).


For their part, the Justice Department and other federal law enforcement components have both helped drive congressional efforts expanding federal jurisdiction over child exploitation offenses and been responsive in implementing such legislative enactments when passed. In February 2006, the Department of Justice launched Project Safe Childhood, a $47 million initiative (appropriated by Congress for fiscal year 2007 alone)\footnote{Adam Walsh Child Protection and Safety Act § 143.} to integrate federal, state, and local efforts, under the leadership of each district's United States Attorney's Office, to prevent and prosecute Internet–based crimes against children.\footnote{Press Release, U.S. Department of Justice, Fact Sheet: Project Safe Childhood (Sept. 23, 2008), http://www.usdoj.gov/opa/pr/2008/September/08-opa-845.html.} The Federal Bureau of Investigation (FBI)–responsible for referring about half of all child exploitation defendants for prosecution – now lists the fight against online predators and other forms of cyber–crime as its third highest criminal priority, behind only counterterrorism and counterintelligence and ahead of such mainstays as public corruption, organized crime, and civil rights.\footnote{FBI, Quick Facts, http://www.fbi.gov/quickfacts.htm (last visited Aug. 30, 2009).}
Service, the United States Postal Inspection Service, and even Immigration and Customs Enforcement have become major players in the fight against child exploitation.\textsuperscript{50}

Increased attention from these agencies has led to a corresponding expansion in the number of federal prosecutions for sex–related offenses against children. In 1994, 313 child exploitation defendants – defined to include those charged with child pornography, sex transportation, and sex abuse crimes – were prosecuted by United States Attorney Offices nationwide.\textsuperscript{51} Only twelve years later, in 2006, the number of prosecutions had risen more than six–fold to 2,039.\textsuperscript{52}

More prosecutions have been accompanied by longer sentences. The average federal prison term for individuals who possess, receive, or share child pornography has more than doubled, from three years in 1994 to more than seven years in 2006.\textsuperscript{53}

II. Manufactured Jurisdiction and Other Government Conduct Defenses

The concept of manufactured jurisdiction in the federal criminal context was first recognized in \textit{United States v. Archer},\textsuperscript{54} a 1973 decision authored by Judge Friendly. The defense quickly took root in the Fourth, Fifth, and Tenth Circuits but was rejected in the Sixth, Seventh, and Eleventh Circuit Courts of Appeals. It came to maturity in 1996, in \textit{United States v. Wallace},\textsuperscript{55} where the Second Circuit devised a three–prong framework for considering government conduct defenses, partnering manufactured jurisdiction with entrapment and due process outrageousness.\textsuperscript{56} The defense continues to be raised, particularly in child exploitation cases.

\textsuperscript{50} U.S. GEN. ACCOUNTING OFFICE, COMBATING CHILD PORNOGRAPHY: FEDERAL AGENCIES COORDINATE LAW ENFORCEMENT EFFORTS, BUT AN OPPORTUNITY EXISTS FOR FURTHER ENHANCEMENT 2 (2002).


\textsuperscript{52} \textit{Id.} Even with this six–fold increase, child exploitation prosecutions represented only about 2.5% of the 83,148 defendants charged in federal courts nationwide. \textit{Id.} Given the high priority now placed on these cases by the Department of Justice and the various federal law enforcement agencies, this percentage can be expected to increase substantially over the next several years.


\textsuperscript{54} United States \textit{v.} Archer, 486 F.2d 670 (2d Cir. 1973).

\textsuperscript{55} United States \textit{v.} Wallace, 85 F.3d 1063 (2d Cir. 1996).

\textsuperscript{56} \textit{Id.} at 1066.
A. United States v. Archer and Its Progeny

In United States v. Archer, agents from a precursor to the Drug Enforcement Agency – the Bureau of Narcotics and Dangerous Drugs – took on a corruption investigation of the Queens County District Attorney’s Office. Undercover agents fabricated a fictitious gun case against one of their own, then paid an assistant prosecutor $15,000 to arrange for a grand jury to return no indictment against him. The assistant district attorney who accepted the bribe, along with a criminal defense lawyer who facilitated the payoff and others, were charged with violating the Travel Act. The statute prohibited the use of “any facility in interstate or foreign commerce with intent to ... carry on ... any unlawful activity,” including bribery.

The sole basis on which the government asserted federal jurisdiction was a series of interstate and international telephone calls between the undercover officer pretending to be the target of bogus gun charges and the defense lawyer responsible for delivering the bribe to the crooked prosecutor. The calls were initiated by the agent solely for the purpose of creating a jurisdictional nexus for a Travel Act prosecution.

Concerned that “[f]ederal auxiliary criminal jurisdiction has spread to the point where there is practically no offense within the purview of local law that does not become a Federal crime if some distinctive Federal involvement happens to be present,” the Second Circuit reversed the convictions. The telephone calls at issue were “a casual and incidental occurrence,” “a matter of happenstance,” and, perhaps most significant to the court, “served no purpose that would not have been equally served by a call from New York; the [agent's location was] a matter of complete indifference to [the defendants].” In sum, Judge Friendly concluded, Congress could not have intended to include within the Travel Act's

57 Archer, 486 F.2d at 670.
58 Id. at 672–74.
59 Id.
61 Id. at §§ 1952(a)(3), (b)(1)(B).
62 Archer, 486 F.2d at 674.
63 Id.
65 Archer, 486 F.2d at 682–83 (internal quotations and citations omitted).
purview "a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime." Such "manufactured jurisdiction is a reflection on the federal judicial system and brings it into disrepute."67

Twelve years later, in 1985, the Fourth Circuit relied on Archer to reverse a Hobbs Act68 conviction in United States v. Brantley.69 There, in another corruption sting, an undercover FBI agent paid off a small-town South Carolina magistrate and a local sheriff to look the other way while he launched an underground casino.70 Federal jurisdiction was premised on transportation of gambling tables and equipment for the gaming establishment by agents from FBI headquarters in Quantico, Virginia.71

"[F]ederal agents may not manufacture jurisdiction by contrived or pretextive means," the court held.72 [(W]hen the jurisdictional predicate is based upon acts of undercover agents, the matter should be examined with greater than ordinary care, and that contrived activity by such agents may not satisfy the requirement."

Applying this heightened level of scrutiny, the Fourth Circuit found that "[i]t was wholly unnecessary for the FBI to move gambling equipment from Virginia to South Carolina, or to have its agents pretend to gamble and to purchase whiskey. We do not think the . . . predicate for federal jurisdiction can be found in such pretense on the part of federal agents."74

In 1991, the Fourth Circuit affirmed its Brantley holding in United States v. Coates.75 In that case, the defendant unwittingly solicited an FBI informant to kill his stepbrother in an inheritance dispute.76 The federal murder-for-hire statute prohibited the "use [of] any facility in interstate or foreign commerce, with intent that a murder be committed . . . ."77 To create a jurisdictional nexus, an FBI agent posing as a hit man "went just over the Maryland line into Virginia, conceded for the sole purpose of making an interstate telephone call to [the defendant]."78 The Fourth Circuit reversed the conviction, holding that "there is no doubt here that,

66 Id. at 681.
67 Id. at 682. (internal quotations and citation omitted).
68 18 U.S.C. § 1951(a) (1948) (prohibiting any act that "obstructs, delays, or affects commerce . . . [by] extortion").
69 United States v. Brantley, 777 F.2d 159, 163 (4th Cir. 1985).
70 Id. at 161.
71 Id.
72 Id. at 163.
73 Id. (citing United States v. Archer, 486 F.2d 670, 681–82 (2d Cir. 1973)).
74 Brantley, 777 F.2d at 163.
76 Id. at 105.
78 Coates, 949 F.2d at 105.
by the government's candid admission, [the agent acted] solely to create a federal crime out of a state crime."79

In addition to the Second and Fourth Circuits, two other circuits recognized the existence of a manufactured jurisdiction defense soon after Archer, while rejecting it on the specific facts before them. In United States v. Garrett,80 another Travel Act bribery case involving union and city council leaders in Texas, the Fifth Circuit held that the law "forbid[s] [a] government agent's movement out-of-state for the sole purpose of manufacturing . . . jurisdiction."81 The jurisdictional entrapment defense was rebuffed in Garrett, however, because the defendants themselves initiated the interstate calls at issue, which "facilitated the unlawful bribery activity within the meaning of the Act, following and as a consequence of which the bribe money was actually paid."82 In United States v. O'Connor,83 which involved the smuggling of stolen uranium, the Tenth Circuit acknowledged that the law prohibits "virtual entrapment," by which federal law enforcement "provok[e]s interstate activity that [the defendant] might not have otherwise done,"84 but held that the interstate activity at issue in the case "was an integral rather than an incidental aspect of the transaction."85

B. Rejection and Retrenchment

Unlike the Second, Fourth, Fifth, and Tenth circuits, other circuit courts have flatly rejected Archer and the concept of jurisdictional entrapment. The Sixth Circuit Court of Appeals, for one, simply "refused to apply the Archer rule."86 "The course of decisions casts doubt," the Seventh Circuit held in United States v. Podolsky87 — in which agents steered the defendant to burn a particular property, then charged him with arson of a building used in interstate commerce88 — "on the vitality of the independent principle

79 Id. at 106.
80 United States v. Garrett, 716 F.2d 257 (5th Cir. 1983).
81 Id. at 267.
82 Id. at 266.
83 United States v. O'Connor, 635 F.2d 814 (10th Cir. 1980).
84 Id. at 817.
85 Id. at 818.
86 United States v. Burdette, No. 02-5915, 2004 WL 93946, at *5 (6th Cir. Jan. 16, 2004), (citing United States v. Graham, 856 F.2d 756, 760-61 (6th Cir. 1988) (noting that "[c]ontrary to the defendant's protestations, the Travel Act does not distinguish between 'initiated' and 'returned' telephone communications").
87 United States v. Podolsky, 798 F.2d 177, 181 (7th Cir. 1986).
88 18 U.S.C. § 844(f)(1) (1988) (stating that "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more
announced [in Archer] that forbids the 'manufacture' of federal jurisdiction in circumstances not constituting entrapment and not canceling any element of the crime such as criminal intent. The Eleventh Circuit, noting Podolsky, concluded in United States v. Petit, a stolen electronics case, that "federal courts have been extremely reluctant to set aside convictions on the sole basis of the principle announced in Archer."

The Petit court went on to question whether limiting the reach of federal statutes by recognizing a jurisdictional entrapment defense was even an appropriate exercise of judicial power: "The decision to involve federal, as opposed to state, resources was made within the bounds of political, rather than judicial, discretion. The government possesses broad discretion in determining whom to prosecute, subject to constitutional constraints prohibiting the exercise of such discretion based on race or other invidious grounds."

Yet several years after Judge Posner tried to put an end to claims of manufactured jurisdiction in Podolsky, another Seventh Circuit panel recognized that "the possibility that a case might arise where federal jurisdiction would be inappropriate because it was 'manufactured' has not been completely foreclosed." Thereafter, while recognizing the existence of the doctrine, a series of decisions in the Seventh Circuit and elsewhere rejected jurisdictional entrapment claims on their facts where the "defendant freely participates in the jurisdictional act," regardless of government instigation or involvement.

Consequently, a stolen goods conviction was affirmed in United States v. Peters, despite the defendant having moved interstate solely at the direction of federal agents, because he "freely and voluntarily drove his stolen truck from Illinois to Indiana." Likewise, in United States v. Gardner, another stolen goods conviction was upheld, even though the jurisdictional element was satisfied only when the defendant traveled from New York to Chicago to deliver purloined treasury bills, and "[t]he sole purpose for meeting [the defendant] in Chicago was [for federal agents] to arrange for the disposition of the securities." Regardless, the court held, "The Government merely afforded the opportunity, and the defendant

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89 Podolsky, 798 F.2d at 181.
90 United States v. Petit, 841 F.2d 1546 (11th Cir. 1988).
91 Petit, 841 F.2d at 1553.
92 Id. at 1554.
93 United States v. Peters, 952 F.2d 960, 963 (7th Cir. 1992).
94 Id. at 963 n.6.
95 Peters, 952 F.2d at 960.
96 Id. at 963.
97 United States v. Gardner, 516 F.2d 334 (7th Cir. 1975).
98 Id. at 344.
chose to seize it. Expounding the same principal in *United States v. Skoczen*, a cigarette smuggling case, the court rejected a manufactured jurisdiction defense because "the government merely was afford[ing] the opportunity and facilities for the commission of the offense charged; the participants were awaiting any propitious opportunity, and never considered themselves limited by boundaries."  

C. United States v. Wallace: Raising Manufactured Jurisdiction Alongside Other Government Conduct Defenses

The Second Circuit revisited *Archer* in 1996. In *United States v. Wallace*, a defendant stealing from the State of New Jersey Teachers' pension fund was convicted of bank fraud after ten of the checks stolen from the state fund were deposited in a Citibank account. Jurisdiction for the federal charge was premised on Citibank's status as an FDIC-insured financial institution.

Confronted with the defendant's claim of manufactured jurisdiction, the Second Circuit sought to assemble the various strands of post-*Archer* authority and to bring manufactured jurisdiction within a global framework of defenses focused on prohibited government conduct:

> [T]he "manufactured jurisdiction" concept is properly understood not as an independent defense, but as a subset of three possible defense theories: (i) the defendant was entrapped into committing a federal crime . . . ; (ii) the defendant's due process rights were violated because the government's actions in inducing the defendant to commit the federal crime were outrageous; or (iii) an element of the federal statute [involving volitional conduct by the defendant] has not been proved, so federal courts have no jurisdiction over the crime.

Although positing manufactured jurisdiction as a "subset" of other defenses, *Wallace*, in fact, created a tripartite structure in which jurisdictional

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99 Id.

100 *United States v. Skoczen*, 405 F.3d 537 (7th Cir. 2005).

101 Id. at 544 (internal quotations and citation omitted).


103 18 U.S.C. § 1344 (1988) ("Whoever knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a [federally-insured] financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a [federally insured] financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.").

104 *Wallace*, 85 F.3d at 1064–65.

105 Id. at 1065.

106 Id. at 1065–66 (internal citations omitted).
entrapment may be raised alongside the two traditional government conduct defenses of entrapment and outrageousness. Indeed, as explained below, because the holdings of Archer, Brantley, and Coates cannot be justified under either entrapment or outrageous government conduct theories, those rulings can be accounted for only by resort to this third defense, which the Wallace decision conceived as being available where "an element of the federal statute [involving volitional conduct by the defendant] has not been proved, so federal courts have no jurisdiction over the crime."\(^{107}\)

1. Entrapment.— To see that Archer, Brantley, and Coates cannot be rationalized as instances of entrapment or outrageous government conduct, it is first necessary to spend a moment defining those defenses. A claim of entrapment, initially put forward in the prohibition-era case of Sorrells v. United States,\(^ {108}\) consists of "two related elements: government inducement of [a] crime and a lack of predisposition on the part of the defendant to engage in the criminal conduct."\(^ {109}\)

The classic case is Jacobson v. United States.\(^ {110}\) After the defendant ordered a then-legal nudist magazine featuring underage boys, he was targeted in a child pornography sting by the Postal Inspection Service and the Customs Service.\(^ {111}\) Almost three years later, and after "26 months of repeated mailings and communications from Government agents and fictitious organizations," the defendant sent off for a pornographic magazine depicting young boys engaged in various sexual activities.\(^ {112}\)

Finding strong evidence of government inducement — more than two years of titillating correspondence before any law was broken, and no evidence of predisposition — and because the nudist magazine ordered by the defendant that led authorities to hone in on him was legal when he purchased it, the Supreme Court reversed defendant's conviction: "Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute."\(^ {113}\)

\(^{107}\) Id.


\(^{111}\) Id. at 542–46.

\(^{112}\) Id. at 550.

\(^{113}\) Id. at 548.
The entrapment defense established in *Sorrells* and applied in *Jacobson*, however, has no place in *Archer, Brantley* or *Coates*. The corruption prosecuted in *Archer*,114 and *Brantley*,115 predated the law enforcement stings at issue, and the homicidal brother-in-law in *Coates* solicited an informant to commit murder in the first instance. This clear-cut evidence of predisposition on the part of the defendants forecloses any possible claim of entrapment.117

2. Outrageous Government Conduct.— As to the due process defense of outrageous government conduct, first recognized by the Supreme Court in *United States v. Russell*,118 the doctrine warrants reversal only where “the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”119

Nonetheless, claims of outrageous government conduct have gained little traction in the thirty-six years since the principle was announced.120 Best described by the First Circuit in *United States v. Santana*,121 “The banner of outrageous misconduct is often raised but seldom saluted.”122 “[I]n only a small handful of . . . cases has the government’s conduct actually been held to be outrageous.”123 Indeed, to the dismay of some commentators, the Sixth Circuit and others have apparently abolished it altogether.124

119 Id. In *Russell*, the Supreme Court confronted the covert infiltration of a methamphetamine ring in which an undercover agent supplied the defendant with a necessary component to manufacture the drug. *Id.* at 425–26. The Supreme Court affirmed the conviction, finding no outrageousness in the case before it, but recognized circuit court lines of authority that prohibited law enforcement from becoming so “enmeshed in the criminal activity that the prosecution of the defendants [is] repugnant to the American criminal justice system.” *Id.* at 428, 435–36 (internal citations omitted).
120 Indeed, as argued by Professor Peter J. Henning, Chief Justice Rehnquist tried to retract his prior acceptance of an outrageousness defense in *Hampton v. United States*, 425 U.S. 484, 488–89 (1976). “Once spoken, however, the apparent recognition of a separate due process right to be free from governmental misconduct in investigating a crime could not be recanted so easily.” Peter J. Henning, *Prosecutorial Misconduct In Grand Jury Investigations*, 51 S.C. L. Rev. 1, 34 (1999).
121 United States v. Santana, 6 F.3d 1 (1st Cir. 1993); see also United States v. Gamble, 737 F.2d 853, 857 (10th Cir. 1984) (“The defense that the government’s conduct was so outrageous as to require reversal on due process grounds is often raised but is almost never successful”).
122 Santana, 6 F.3d at 4.
124 Jason R. Schulze, Note, United States v. Tucker: Can the Sixth Circuit Really Abolish the
At a minimum, this "extraordinary defense [is] reserved for only the most egregious circumstances" where the challenged conduct is "shocking, outrageous, and clearly intolerable." 125 Nothing about law enforcement's behavior in Brantley (establishing a covert gambling den) or Coates (pretending to put a would-be killer in contact with a hit man) meets this standard or exceeds the bounds of traditional undercover work. And while some courts have sought to write off Archer as an outrageousness case, 126 it is axiomatic that a defendant cannot claim outrageousness where government agents either "infiltrate an ongoing criminal enterprise" or "induce a defendant to repeat or continue a crime or even . . . expand or extend previous criminal activity." 127 Therefore, for the same reason an entrapment defense fails - because Archer involved an ongoing corruption racket to which the defendant was necessarily predisposed - outrageous government conduct likewise cannot succeed.

3. Manufactured Jurisdiction.— If Archer, Brantley, and Coates cannot be explained as either entrapment or outrageous government conduct, this leaves only the last of Wallace's "three possible defense theories," where "an element of the federal statute [involving a volitional act by the defendant] has not been proved, so federal courts have no jurisdiction over the crime." 128 It is under this rubric where all Archer claims rightly fall and where Wallace properly lines up the post-Podolsky line-of-authority allowing a manufactured jurisdiction defense only where there is no "link between the federal element and a voluntary, affirmative act of the defendant." 129

In Archer 131 and Coates, 132 federal jurisdiction was premised on interstate telephone calls initiated by law enforcement, not by the defendants. In Brantley, the jurisdictional nexus was the FBI's interstate transportation of gambling equipment, without the defendants' knowledge or involvement. 133 In contrast, in Wallace, the manufactured jurisdiction defense was rejected because while federal agents engineered the use of Citibank to deposit stolen state pension fund checks, the defendant then independently called

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125 Mosley, 965 F.2d at 910.
126 See, e.g., United States v. Wallace, 85 F.3d 1063, 1066 (2d Cir. 1996) (noting that "the government's conduct in Archer . . . arguably could have supported a due process claim of outrageousness").
127 Mosley, 965 F.2d at 911.
128 Wallace, 85 F.3d at 1065-66.
129 United States v. Podolsky, 798 F.2d 177 (7th Cir. 1986).
130 Id. at 1066.
the FDIC-insured bank to confirm the deposit and ordered an accomplice to withdraw funds. "Unlike the conspirators in Archer, who never agreed to make any interstate phone calls, Wallace and his coconspirators clearly undertook to ... withdraw money from Citibank. The jurisdictional element was therefore an essential part of the conspiratorial agreement [and] all of the statutory elements have been met."

In sum, three conflicting lines of authority have emerged in manufactured jurisdiction doctrine post--Wallace. First: the Sixth and Eleventh Circuits appear to reject outright claims of jurisdictional entrapment. Second: the Fourth Circuit, never having limited (much less overruled) Brantley or Coates, seemingly takes the broadest view, creating a subjective test focused on the intent of law enforcement: a “predicate for federal jurisdiction can [not] be found in ... pretense on the part of federal agents,” nor may law enforcement act “solely to create a federal crime out of a state crime.” Third: the majority view, set out by the Second, Fifth, Seventh, Ninth, and Tenth Circuits, stakes out a middle ground, conditioning claims of jurisdictional entrapment on the objective conduct of the defendant: whether he “voluntarily and of his own free will did the act that caused the interstate element to exist,” regardless of whether that act was instigated by federal agents or if they did so exclusively for the purpose of supplying a federal jurisdictional nexus.

135 Id.
137 United States v. Petit, 841 F.2d 1546, 1555-54 (11th Cir. 1988).
138 Brantley, 777 F.2d at 163.
140 Wallace, 85 F.3d at 1066.
141 United States v. Faison, 679 F.2d 292, 295 (3d Cir. 1982) (describing how “Faison took advantage of interstate communication to effectuate his plan and coordinate the various players’ actions”).
142 United States v. Clark, 62 F.3d 110, 114 (5th Cir. 1995) (“[T]he defendant voluntarily and of his own free will did the act that caused the interstate element to exist.”).
143 United States v. Peters, 952 F.2d 960, 963 n.6 (7th Cir. 1992).
144 United States v. Bagnariol, 665 F.2d 877, 898 (9th Cir. 1981) (“[W]hether the defendant or government takes the initiative is a substantial difference.”).
145 United States v. O’Connor, 635 F.2d 814, 817 (10th Cir. 1980) (“The FBI agents did not provoke interstate activity that O’Connor might not otherwise have done.”).
146 Clark, 62 F.3d at 114.
III. MANUFACTURING JURISDICTION TO CATCH CHILD PREDATORS

Only a handful of appellate-level decisions nationwide have considered claims of manufactured jurisdiction in the child exploitation context. In each case, a federal agency established a physical or electronic “storefront” – a type of “reverse sting” in which agents pose as purveyors of contraband rather than its consumers – trading in material exploiting children or the facilitation of sex acts with children. As described below, the interstate (or international) character of the front operation was readily apparent in each case and the defendants freely participated in wrongdoing, knowing full well the multi-jurisdictional nature of their misconduct. As a result, Wallace’s objective standard was met and the defendants’ claims of manufactured jurisdiction summarily were rejected.

These lessons seemingly have been well-learned by federal agencies executing child exploitation stings around the country. A sample of recent cases demonstrates the use of both globally accessible storefronts and more narrowly focused, but equally effective, “lemonade stands” placed in electronic environments known to be frequented by child predators. A final case, United States v. Al-Cholan, reveals the potential dangers of not using these techniques and instead devising ad hoc settings to target individual defendants.

A. Manufactured Jurisdiction in Child Exploitation Cases

1. Child Pornography.— A number of appellate decisions have considered undercover operations aimed squarely at the purveyors of child pornography. In United States v. Schatt, the United States Customs Service developed an undercover Internet Web site advertising child pornography purportedly available overseas. After the defendant placed an order and was convicted of receiving child pornography, the Tenth Circuit rejected his claim of manufactured jurisdiction: “The evidence shows that Schatt knowingly ordered pornographic videotapes from a source outside the state of Oklahoma.”

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150 Id. at *1.
151 18 U.S.C. § 2252(a)(2) (1994) (prohibiting the knowing receipt or distribution of any visual depiction of a minor engaged in sexually explicit conduct “using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means . . .”).
152 Schatt, 2000 WL 358460, at *2.
The Schatt storefront was patterned on United States v. Goodwin,\textsuperscript{153} in which the Postal Inspection Service formed the "Far Eastern Trading Company, Ltd. of Hong Kong" as a sham child pornography mail order firm.\textsuperscript{154} The authorities chose Hong Kong, after obtaining permission from the local government, because a substantial quantity of prohibited images originated there.\textsuperscript{155} In Goodwin, the defendant placed an order for contraband featuring minors engaged in sexually explicit conduct and was convicted of receiving child pornography.\textsuperscript{156} His claim of manufactured jurisdiction was rejected by the Fourth Circuit noting the "use of the mails was an entirely necessary element of the undercover operation, which was national in scope."\textsuperscript{157}

So, too, in United States v. Esch,\textsuperscript{158} the Postal Inspection Service created a fictitious organization known as "Love Land," headquartered at a post office box in Colorado, and solicited images of child pornography.\textsuperscript{159} After a group of defendants shipped homemade pictures to the postal box, they were convicted of manufacturing child pornography\textsuperscript{160} and the Tenth Circuit again rejected the resulting manufactured jurisdiction claim. In doing so, the court held "[defendants] consistently expressed a willingness

\textsuperscript{153} United States v. Goodwin, 854 F.2d 33 (4th Cir. 1988).
\textsuperscript{154} Id. at 34.
\textsuperscript{155} Id.
\textsuperscript{156} 18 U.S.C. § 2252(a)(2).
\textsuperscript{157} Goodwin, 854 F.2d at 37 n.3.
\textsuperscript{158} United States v. Esch, 832 F.2d 531 (10th Cir. 1987).
\textsuperscript{159} Id. at 533-34.
\textsuperscript{160} 18 U.S.C. § 2251(a) (1982) ("Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in...any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed...or if such visual depiction has actually been transported in interstate or foreign commerce or mailed").

On October 30, 1998, Congress greatly expanded the jurisdictional reach of the statute prohibiting the manufacture of child pornography. Prior to that date, production of prohibited visual depictions could be prosecuted federally only if the illicit material either was transported in interstate commerce or mailed (or if the defendant knew or had reason to know that they would be). See id. In passing the Protection of Children from Sexual Predators Act of 1998, Congress added as a jurisdictional basis the manufacture of prohibited images "using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer . . . ." Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, § 201, 112 Stat 2974, 2977 (1998). One of the purposes of the amendment "was to extend the statute to cases where proof of the interstate transportation of the depictions, or proof of the pornographer's knowledge as to the interstate transportation was absent." United States v. Holston, 343 F.3d 83, 86 (2d Cir. 2003). Thus, so long as it could be established that some part of the illicit matter was produced with extra-territorial materials — the camera (or its component parts), film, paper, computer discs, etc. — there would be federal jurisdiction.
to correspond through interstate mailings and to send sexually explicit photographs through the mail. Further, the defendants' production of the sexually explicit photographs, with the knowledge that the photographs would be mailed, constituted activity which represented an integral, rather than an incidental or unforeseen, aspect of the criminal transaction."

2. Child Sex Tourism.— In addition to child pornography, other appellate courts have weighed in on stings aimed at child sex tourists. In United States v. Mayer, the defendant purchased tickets to Mexico through an FBI-constructed travel Web site. Correspondence with an undercover agent established that the defendant intended to go to Mexico to have sex with young boys. Defendant was arrested while traveling to Mexico and later convicted of travel with intent to engage in illicit sexual conduct. His claim of manufactured jurisdiction was rejected by the Ninth Circuit: "Here, traveling to another country, where access to young boys would be easier, was part of the plan from inception to execution. Interstate travel was an integral part of the crime itself, and not contrived simply to guarantee federal jurisdiction."

Similarly, in United States v. Roberts, "the defendant... responded to an advertisement in a newspaper for Costa Rica Taboo Vacations, a fake travel agency run by federal investigators trying to crack down on commercial sex operations between Costa Rica and Florida." After the defendant used a credit card to pay an undercover agent for two underage Costa Rican prostitutes, he was convicted of attempting to engage a minor for commercial sex purposes. The Eleventh Circuit rejected his jurisdictional entrapment claim: "The government did not manufacture jurisdiction over Roberts's conduct, because it was not solely responsible for placing Roberts's money into interstate commerce. Roberts chose to pay with a credit card rather than a cashier's check, and thus created the possibility that his payment would be processed by a bank in another state."

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161 Esch, 832 F.2d at 539.
162 United States v. Mayer, 503 F.3d 740 (9th Cir. 2007).
163 Id. at 747.
164 Id.
165 18 U.S.C. § 2423(b) (2006) ("A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.").
166 Mayer, 503 F.3d at 755.
168 Id. at *476.
B. Undercover Child Exploitation Stings

A sample of five recent child exploitation cases demonstrates that federal law enforcement has generally but not entirely assimilated the lessons taught in Archer, Wallace, and elsewhere to avoid claims of jurisdictional entrapment. Four of the cases involved storefront scenarios akin to those sanctioned in Schatt, Goodwin, Esch, Mayer, and Roberts, while a fifth concerned the particularized targeting of a defendant and concommitant design of an improvised sting that mirrored some of the difficulties present in Archer, Brantley, and Coates.

1. Storefronts: United States v. Shutts and United States v. Buelow.—Spinning off the travel agency described in Roberts, FBI agents in Miami engineered another storefront targeting child sex tourists in United States v. Shutts and United States v. Buelow. Advertising both online and in adult magazines, the FBI front, “Latin America Pleasure Tours,” promised travelers to Costa Rica “clean, fun-loving companion[s] of varying ages for your pleasure vacation.” In Shutts, the defendant paid either $600 or $2,100 for the sexual services of a 14- to 15-year-old prostitute and was arrested en route to Costa Rica from Rochester, New York. In Buelow, the defendant likewise paid for “a minor escort of 14–15 years of age,” after soliciting “photographs of minors between the ages 10–11 years old to see if [he] wanted to arrange any sexual services with them.” The defendant was arrested during an airport layover in Atlanta.

A Miami district court quickly disposed of Shutts’ manufactured jurisdiction claim. Finding that the “[d]efendant purposefully delivered a money order through the U.S. Postal Service to a post office box in the Southern District of Florida to effectuate his criminal activity [and used] the telephone to call law enforcement in this District,” the court held that “[e]ven if we could consider the illusory concept of manufactured jurisdiction a jurisdictional entrapment,” the court held that “[e]ven if we could consider the illusory concept of manufactured jurisdiction ...
jurisdiction, we would not have applied it in this case.”

In Buelow, no claim of manufactured jurisdiction was asserted because the defendant pled guilty soon after indictment to charges of attempted travel to engage in illicit sexual conduct, waiving both jurisdictional claims and appellate rights. He was sentenced to 140 months (just under twelve years) imprisonment. Given the factual similarities between Buelow, Roberts, and Schutts, however, there is every reason to believe any such claim would have been rejected.

2. Lemonade Stands: United States v. Brockdorff and United States v. Atchison.—A different kind of storefront from those in Schutts and Buelow—perhaps better described as an electronic “lemonade stand” offering up an individual child rather than a corporate-style travel agency—was developed by a Maryland-based undercover federal agent in United States v. Brockdorff and by a Macomb County, Michigan, sheriff’s detective in United States v. Atchison.

In Brockdorff, a federal agent posing as a thirteen-year-old and using the America Online screen name, “Britneyluv,” was contacted by the defendant, a NASA engineer. During the course of several electronic and telephonic conversations, Brockdorff told the agent he wanted to meet and have sex with her thirteen-year-old persona and sent a sexually suggestive photograph of himself. The agent agreed to meet and, despite (or because of) the fact that both she and Brockdorff were located in Maryland, set the rendezvous at the Mazza Gallerie, a shopping mall located one block over the Maryland/District of Columbia border. When he arrived, the defendant was arrested and charged with traveling in interstate commerce to engage in illicit sexual conduct.

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178 Schutts, 2007 WL 4287666, at *2–3. The Miami court’s hesitation to even consider a jurisdictional entrapment defense is consistent with the Eleventh Circuit’s apparent failure to recognize one. See United States v. Petit, 841 F.2d 1546, 1553–54 (11th Cir. 1988).

179 18 U.S.C. § 2423(e) (2006) (“Whoever attempts or conspires to [travel in interstate commerce or travel into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct] shall be punishable in the same manner as a completed violation . . . .”).


184 Brockdorff, 992 F.Supp. at 23.

185 Id.

186 Id.

187 Id.
Relying on the Fifth Circuit’s reasoning in *Clark*, the D.C. District Court rejected Brockdorff’s claim of manufactured jurisdiction: “Here, although the government chose Mazza Gallerie for the sole purpose of creating a federal offense, Mr. Brockdorff voluntarily went there, knowing that he was crossing a state line. The Court finds that he did so at the risk of being subject to any laws based on crossing that line.”

Like the federal agent in *Brockdorff*, a county sheriff’s deputy fashioned an undercover online persona in *United States v. Atchison*, by posing as a Michigan mother selling her five-year-old child for sex on a Web site believed to be frequented by child predators. After two weeks of instant message chats in which the defendant, an assistant United States attorney from Gulf Coast, Florida, solicited a variety of sex acts with the five-year-old, he flew to Detroit, where he was arrested after disembarking a Continental Airlines flight. He was charged with enticement and travel to engage in illicit sexual conduct.

The defendant in *Atchison* never put forth a manufactured jurisdiction defense because within weeks of being charged, he committed suicide while in federal custody awaiting trial. But, as in *Buelow*, and for the reasons discussed in *Mayer*, *Schutts*, *Brockdorff*, having freely traveled to Michigan, there is little reason to think that Atchison could have prevailed on a jurisdictional entrapment claim.

3. Ad hoc *chicanery*: United States *v*. Al-Cholan.— A manufactured jurisdiction defense was offered in *United States v. Rahib Al-Cholan*. The defendant, a ten-year Iraqi army veteran formerly stationed with tank and artillery units in Baghdad and Basra, immigrated to the United States in 1995. In 2007, as in *Coates*, Al-Cholan unwittingly solicited a federal

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188 United States *v*. Clark, 62 F.3d 110, 114 (5th Cir. 1995).
190 Second Amended Complaint, United States *v*. Atchison, No. 07-20463 (E.D. Mich. 2007).
191 *Id.* at 2.
192 *Id.* at 3-4.
193 18 U.S.C. § 2422(b) (2006) (“Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.”).
informant, here seeking to buy sex with a child. Al-Cholan admitted to the informant that he had molested at least 100 children in Iraq and had trolled the streets of Dearborn in a green minivan, trading food, toys, and small sums of cash for sex acts with minors he picked up outside a drug store.

Over a handful of days, federal agents assembled a makeshift sting targeting Al-Cholan. The informant told the defendant that a man was offering to sell his twelve-year-old niece for sex in Toledo, Ohio. After first complaining that his van was inadequate to make the sixty-mile journey, Al-Cholan agreed to go when the cooperator said he would supply transportation.

After being driven to Ohio and paying an undercover agent posing as the girl’s uncle $110 in the Toledo hotel’s parking lot, Al-Cholan was arrested and charged with interstate travel to engage in an illicit sex act. He was convicted at trial and sentenced to 112 months’ (just under ten years) imprisonment.

Before sentencing, Al-Cholan argued in a new trial motion that “there was [no] reason for the Defendant to be transported across the Michigan/Ohio border except so as to create federal jurisdiction and there is a complete dearth of any evidence as to any volitional determination by the Defendant to cross the state border . . . .” Although precisely parroting the language of a manufactured jurisdiction claim required by Wallace, Al-Cholan’s attorneys failed to offer any authority to support it and the argument was rejected by the district court without significant analysis. The case is on appeal.

On the surface, there is much in Al-Cholan to raise jurisdictional entrapment concerns. As in Archer, placing the fictitious twelve-year-old in Toledo “served no purpose that would not have been equally served by” putting her in Michigan; her location was “a matter of complete indifference to” Al-Cholan. To paraphrase Brantley and Coates, the “predicate for federal jurisdiction [was] found[ed on the] pretense of

198 Id.
200 Detention Order, supra note 196, at 2.
201 Id.
203 Judgment in a Criminal Case, supra note 147, at 2.
federal agents," who acted "solely to create a federal crime out of a state crime." Furthermore, as the Tenth Circuit cautioned against in O'Connor, federal agents surely "provoke[d] interstate activity that [Al-Cholan] might not have otherwise done."

Yet the heady language of those early opinions has given way to the practical reality of Wallace and subsequent decisions. Thus, even if the Al-Cholan verdict was not insulated by the Sixth Circuit's refusal to recognize a manufactured jurisdiction defense, the conviction would still stand. Even though federal agents engineered the sting for the precise purpose of creating an interstate nexus, it was Al-Cholan that agreed to be driven to Toledo and that paid for sex with a child, thereby "voluntarily and of his own free will [doing] the act that caused the interstate element to exist."

Like the sex tourist in Brockdorff, "although the government chose [Toledo] for the sole purpose of creating a federal offense, [Al-Cholan] voluntarily went there . . . crossing a state line. . . . [H]e did so at the risk of being subject to any laws based on crossing that line." Similar to the cigarette smugglers in Skoczen, "the government merely . . . afford[ed] the opportunity and facilities for the commission of the offense charged; [Al-Cholan was] awaiting any propitious opportunity, and never considered [himself] limited by boundaries."

IV. DEVELOPING UNDERCOVER OPERATIONS TO AVOID CLAIMS OF JURISDICTIO NAL ENTRAPMENT

A review of manufactured jurisdiction case law, as well as consideration of a recent sample of cases involving child exploitation stings, has allowed for the development of a set of guideposts for future federal undercover law enforcement operations — generally applicable but appropriate to child exploitation cases in particular — to avoid claims of jurisdictional entrapment.

First, storefront operations accessible by all members of a criminal underground (and often by the public at large) should be used in place of ad hoc stings targeting individual defendants. The undercover website in Schatt, the mail order firm in Goodwin, the pro-pornography organization in Esch, and the travel websites in Mayer, Roberts, Shutts, and Buelow were

208 United States v. Brantley, 777 F.2d 159, 163 (4th Cir. 1985).
210 United States v. O'Connor, 635 F.2d 814, 817 (10th Cir. 1980).
212 United States v. Clark, 62 F.3d 110, 114 (5th Cir. 1995).
214 United States v. Skoczen, 405 F.3d 537, 544 (7th Cir. 2005) (internal quotations and citation omitted).
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universally inclusive environments with which persons seeking an outlet for exploitative behavior could (and did) make contact. The “lemonade stands” used by the Maryland agent in Brockdorff and by the sheriff’s deputy in Atchison, advertising conjured up thirteen- and five–year-olds, served the same purpose and achieved the same result. In contrast, makeshift stings targeting a particular dirty prosecutor in Archer, a specific corrupt sheriff in Brantley, and an individual deranged killer in Coates led to those convictions being reversed, while the focus on a particular pedophile in Al-Cholan provided fertile ground for a claim of manufactured jurisdiction.

Second, and related to the first point, the storefront should make its interstate (or international) character obvious and plain. A defendant doing business with the Far Eastern Trading Company, Ltd. of Hong Kong’s or Latin America Pleasure Tours would find it hard to pretend that he did not “freely participate[] in the jurisdictional act.”

Of course, storefront operations are inherently passive. By their nature, they must await contact from a universe of unknown subjects rather than seeking evidence against a particular target. As a result, in cases where a defendant contacts someone who, unknown to him, is cooperating with authorities and seeks to execute a criminal design – a murder–for–hire in Coates, sex with a child in Al-Cholan – use of a storefront becomes more difficult and may perhaps be impractical. In such cases, an increased focus on the remaining guideposts discussed herein becomes even more important.

What is best required under such circumstances is that law enforcement agencies, perhaps working in concert, have developed preexisting storefronts across a range of illegal industries to which the informant can funnel a willing target. Since the operatives carrying out a reverse sting often will be “burned” in the course of an arrest and subsequent prosecution, the storefront (or lemonade stand) need not be extravagant or complicated but, instead, should be easily replicable.

By way of example, pedophiles often seek legal outlets for their sexual deviance. An undercover agent positioned in a strip club – cast as a manager with reputed access to underage girls – could over time become a fixture in the underground community trading in child sex and serve as a trap for informant–derived targets. So when information is developed that a particular individual warrants the potential surrender of this valuable undercover resource, he can be steered to the agent, who will offer the target a “menu” of underage girls, all located out–of–state, on an Indian reservation or other territorial jurisdiction of the United States. Because

217 United States v. Peters, 952 F.2d 960, 963 n.6 (7th Cir. 1992).
the defendant will then "freely and voluntarily" travel to the bait, and because the agent will have been in place long before the particular defendant was targeted, any jurisdictional entrapment claim will be foreclosed.

Third, law enforcement should seek to develop evidence of a target’s independent volition, detached from law enforcement, to act in interstate (or international) commerce or, where applicable, to use the instrumentalities of interstate commerce in committing the crime. In United States v. O’Connor, the uranium smuggling case, the defendant “demonstrated a willingness to sell to any buyer, regardless of the possibility of interstate transactions.”

In United States v. Peters, a truck thief “showed no reluctance in joining a conspiracy that would result in his stolen truck being transported out of Illinois” and “made it clear to Agent Poole that he desired to engage in ongoing interstate criminal activity.” And in United States v. Faison, the defendants used interstate “telephone conversations between Mancuso in New Jersey and Faison at his place of business in New York” to conspire to deposit stolen checks as part of their fraud scheme. In contrast, the absence of such evidence forced futile reliance on solitary calls initiated by federal agents, dooming the prosecutions in Archer and Coates.

Fourth, even where there is limited evidence of “jurisdictional predisposition” – i.e. prior instances in which the defendant crossed a state or national boundary to commit the charged offense – federal agents should gather evidence of the defendant’s generic predisposition to commit similar crimes. Such evidence will not only defeat a classic entrapment defense but one of jurisdictional entrapment as well. Al-Cholan, in which the defendant admitted to molesting children in Iraq before immigrating to the United States and many more after arriving in Dearborn, Michigan, is a good example. In the face of such evidence, there is little that Al-Cholan or similarly situated defendants can do to rebut the argument that a government sting merely “afforded the opportunity and facilities for the commission of the offense charged; the participants were awaiting any propitious opportunity, and never considered themselves limited by boundaries.”

Fifth, federal agents constructing a sting should include an interstate nexus, by design, as an integral component of, rather than a mere incident to, the anticipated wrongdoing. A child pornography operation, for instance,

219 Peters, 952 F.2d at 963.
220 United States v. O’Connor, 635 F.2d 814, 817 (10th Cir. 1980).
221 Peters, 952 F.2d at 963.
222 United States v. Faison, 679 F.2d 292, 294 (3d Cir. 1982).
224 United States v. Scozzen, 405 F.3d 537, 544 (7th Cir. 2005) (internal quotations and citation omitted).
must be set up so that orders are placed and prohibited images shipped through the mails or by Internet, rather than delivered in-person, thereby making such instrumentalities "an entirely necessary element of the undercover operation." The child pornography stings in Schatt, Goodwin, and Esch all met this standard and were sanctioned by courts as a result.

Lastly, and of overriding importance, the defendant must be made to "freely participate[] in the jurisdictional act," regardless of the instigation or involvement required by law enforcement.226 This was the critical missing element in Archer, Brantley, and Coates. In contrast, the defendants in Wallace, Faison, Schatt, Goodwin, and Esch were all made to take advantage of the tools and instrumentalities of interstate commerce to consummate wrongdoing. So, too, the defendants in Clark, Gardner, Peters, O'Connor, Mayer, Roberts, Shutt, Buelow, Brockdorff, Atchison, and Al-Cholan, unlimited by boundaries, were all made to cross state and national borders, thereby making "[i]nterstate travel . . . an integral part of the crime itself."227 As a result, regardless of the sometime pervasive prodding by law enforcement in these cases, all these ultimately were blessed by courts as "not contrived simply to guarantee federal jurisdiction." 228

As Wallace and other decisions have held, it is only this last guidepost – the commission of a voluntary jurisdictional act by the defendant – that is essential to push back a charge of manufactured jurisdiction, at least in the overwhelming majority of circuits. Whether the free exercise of volition in consummating a jurisdictional act remains both a necessary and sufficient condition in government conduct jurisprudence, in the face of potential judicial resistance against ever-expanding federal encroachment on areas traditionally reserved to state and local authorities, remains an open question. At a minimum, as Professor Daniel Richman has cautioned, "That courts can play only a limited role in patrolling federal criminal jurisdiction as a statutory or constitutional matter . . . does not mean that they cannot contribute significantly to making federal authorities more accountable for their enforcement choices." 229 To avoid any retrenchment by the courts in judging claims of jurisdictional entrapment, therefore, undercover law enforcement operations should seek to capture as many of the guideposts enumerated above as possible when developing stings targeting child predators and others.

225 United States v. Goodwin, 854 F.2d 33, 37 n.3 (4th Cir. 1988).
226 United States v. Peters, 952 F.2d 960, 963 n.6 (7th Cir. 1992).
227 United States v. Mayer, 503 F.3d 740, 755 (9th Cir 2007).
228 Id.