

Criminal Law—Derivative Entrapment Defense Applies When Government Agent Acts Through Unsuspecting Middleman to Induce Targeted Defendant—*United States v. Luisi*, 482 F.3d 43 (1st Cir. 2007)

The entrapment defense is a judicially created protection mechanism against police activity that improperly induces a non-predisposed individual to commit a crime.¹ In some jurisdictions, the derivative entrapment defense is available when a government agent directs an unsuspecting third party to pressure a targeted individual into breaking the law.² In *United States v. Luisi*,³ the Court of Appeals for the First Circuit examined the degree of government inducement required to prove derivative entrapment.⁴ The court held that a government agent must have “requested, encouraged, or instructed” the intermediary to improperly induce a specifically targeted individual who is not predisposed to commit the crime in question.⁵ In support of its holding, the court cited policy concerns adapted from *United States v. Bradley*.⁶

The Federal Bureau of Investigation (FBI) initiated an investigation of Robert Luisi, Jr. for his criminal involvement as a supervisor in the “La Cosa Nostra” (LCN) crime family.⁷ As part of the investigation, the FBI recruited LCN member Ronald Previte to act as a paid informant.⁸ Under FBI direction, Previte introduced Luisi to Michael McGowan, an undercover FBI agent, and the two conducted transactions involving stolen property.⁹

1. See *Sorrells v. United States*, 287 U.S. 435, 443 (1932) (recognizing entrapment defense for first time in Supreme Court history). The Court reasoned that the primary objective of a police force should be law enforcement, not creating crimes. *Id.* at 444; see also *Sherman v. United States*, 356 U.S. 369, 372-73 (1958) (setting forth two-part entrapment test necessitating improper government inducement and defendant’s lack of criminal predisposition); Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 86 (2004) (tracing entrapment defense’s history as judicially created in twentieth century).

2. See *United States v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997) (recognizing derivative entrapment as middleman delivering government inducement to defendant); *United States v. Valencia*, 645 F.2d 1158, 1168 (2d Cir. 1980) (asserting derivative entrapment as government provoking defendant through unsuspecting middleman); WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 9.8(a) (2d ed. 2003) (defining derivative entrapment as government agent passing inducement through unwitting middleman to third party).

3. 482 F.3d 43 (1st Cir. 2007).

4. *Id.* at 55-56 (analyzing extent of government instruction or suggestion required for derivative entrapment).

5. *Id.* at 55 (outlining derivative entrapment elements).

6. 820 F.2d 3, 8 (1st Cir. 1987) (outlining policy reasons for upholding entrapment defense). The derivative entrapment defense is supported by the policies of increasing the government’s accountability in sting operations and protecting innocent citizens from involvement in crime. *Id.* at 6-8. Conversely, policy arguments against the entrapment defense include increasing criminal accountability and the stifling of contraband investigations by police. *Id.* at 7-8.

7. 482 F.3d at 45.

8. *Id.* (explaining Previte worked with FBI under paid personal services contract).

9. *Id.* at 46 (showing criminal relationship between McGowan and Luisi).

Eventually, Previte urged Luisi to accept diamonds from McGowan in exchange for cocaine that Luisi would provide.¹⁰ LCN boss Joseph Merlino was present at the meeting, but did not order Luisi to carry out the deal.¹¹ Luisi orally agreed to enter the deal with McGowan but would not deliver the cocaine despite McGowan's repeated requests to complete the transaction.¹² In an attempt to effectuate the transaction, Previte informed Merlino that Merlino would profit from the deal and asked him to tell Luisi to deal cocaine with McGowan.¹³ In response, Merlino took part in a conference call with Previte, McGowan, and Luisi, and asked Luisi to enter into the cocaine deal; Luisi agreed.¹⁴ As a result, Luisi made three cocaine transactions with McGowan, which led to his arrest and indictment on one count of conspiracy to possess cocaine with intent to distribute and two counts of possession of cocaine with intent to distribute.¹⁵

At trial, Luisi raised an entrapment defense, arguing that Previte, as a government agent, induced Merlino to order Luisi to enter into the cocaine transactions.¹⁶ Luisi testified he had no alternative but to comply with an order from a LCN boss, and he otherwise would not have dealt cocaine due to a spiritual awakening that made him realize that dealing drugs was unacceptable.¹⁷ The trial court instructed the jury that, in considering the entrapment defense, they should only recognize the relationship between McGowan, Previte, and Luisi.¹⁸ The trial court reasoned that Luisi was not entitled to an entrapment instruction regarding Merlino because Previte, as a subordinate of Merlino, could not instruct Merlino to order Luisi to do anything.¹⁹ The First Circuit held that the defense of derivative entrapment should be available even if Previte merely urged or suggested that Merlino improperly induce Luisi to sell cocaine.²⁰

The entrapment defense originated in early twentieth-century Supreme Court decisions concerned with protecting otherwise innocent individuals from falling prey to government-manufactured schemes of illegal activity.²¹ Congress, or

10. *Id.* (establishing initial discussion of cocaine deals).

11. 482 F.3d at 45-46 (noting Merlino's knowledge of cocaine deal and silent acquiescence).

12. *Id.* at 46-47 (showing Luisi's initial agreement to deal cocaine and repeated hesitancy to complete transaction).

13. *Id.* at 48 (illustrating Previte's inducement of Merlino).

14. *Id.* (providing transcript of Merlino's request).

15. 482 F.3d at 48-49 (describing Luisi's involvement in cocaine transactions and arrest).

16. *Id.* at 50 (announcing Luisi's derivative entrapment defense).

17. *Id.* at 49 (explaining Luisi's fear of harm by LCN). Luisi also shared in profits from numerous recent drug deals by members of his crew. *Id.*

18. *Id.* at 51 (noting trial court's entrapment instruction excluded Merlino's involvement as middleman).

19. 482 F.3d at 51 (noting trial court's unwillingness to recognize middleman involvement in entrapment defense).

20. *Id.* at 55 (outlining First Circuit's test for recognizing derivative entrapment).

21. *See supra* note 1 and accompanying text (describing two preeminent Supreme Court cases establishing two-part test for entrapment defense); *see also* Rebecca Roiphe, *The Serpent Beguiled Me: A*

the courts, may modify the defense as they see fit, since it is not constitutional in nature.²² Accordingly, the Supreme Court has outlined a two-part entrapment test, followed by the various federal circuits either completely or in part, that must be satisfied for a defendant to successfully utilize the entrapment defense.²³ The first prong—improper government inducement—is met when the government employs an overreaching method that excessively persuades or exploits an individual’s noncriminal motive.²⁴ Secondly, the defendant must not have been ready and willing to commit the crime independent of the government’s inducement.²⁵

History of the Entrapment Defense, 33 SETON HALL L. REV. 257, 288-90 (2003) (explaining entrapment defense originated in controlled substance context during prohibition). In passing the National Prohibition Act, Congress did not intend for police to create criminals through inducement. Roiphe, *supra*, at 289-92; Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122, 1123 (1982) [hereinafter *Entrapment Through Middlemen*] (indicating courts manufactured entrapment defense to prevent law enforcement from creating criminal offenses).

22. See *United States v. Russell*, 411 U.S. 423, 432-34 (1973) (expounding entrapment defense is non-constitutional and therefore amendable by congressional action); *Sherman v. United States*, 356 U.S. 369, 372 (1958) (implying Congress’s lack of intent to legalize entrapment means Congress could modify entrapment defense); *Stevenson, supra* note 1, at 87-89 (illustrating entrapment as non-constitutional, but many circuits follow Supreme Court’s interpretation); John E. Nilsson, Note, *Of Outlaws and Offloads: A Case for Derivative Entrapment*, 37 B.C. L. REV. 743, 746-47 (1996) (defining Supreme Court’s power to mold entrapment defense).

23. See *Sherman v. United States*, 356 U.S. 369, 372-73 (1958) (elaborating two-part test of improper government inducement and lack of predisposition for first time); *United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir. 1994) (laying out both elements of entrapment defense); see also 482 F.3d at 52 (stressing defendant’s burden of production met only when both prongs of entrapment test are satisfied). Compare *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir. 1994) (acknowledging burden of production satisfied if defendant only presents scintilla of evidence on entrapment elements), with *United States v. Pratt*, 913 F.2d 982, 988 (1st Cir. 1990) (requiring reasonable juror to believe evidence that defendant met both elements before burden of production satisfied). See generally *Stevenson, supra* note 1, at 88-90 (defining *Sorrells* test as “objective test” used by majority of circuits). The “objective test” focuses more on the actions of the government as an improper inducement, while the “subjective test,” used by a minority of federal circuits, is based on the defendant’s history and choices in determining predisposition to commit the crime. *Id.* at 91-92.

24. Compare *Jacobson v. United States*, 503 U.S. 540, 553 (1992) (quoting *United States v. Sorrells*, 287 U.S. 435, 442 (1932)) (“Law enforcement officials go too far when they ‘implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute’”), with *United States v. Turner*, 501 F.3d 59, 70 (1st Cir. 2007) (defining improper inducement as excessive pressure or exploitation of non-criminal motive), and *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994) (describing improper inducement as solicitation by force, intimidation, or threats). Improper inducement is the creation of an unfair advantage by the government that goes beyond the provision of an opportunity for the defendant to commit the crime. *United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir. 1994).

25. See *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (highlighting government’s predisposition guidelines considering past commission and propensity for similar crimes, absent government involvement); *United States v. Rogers*, 121 F.3d 12, 17 (1st Cir. 1997) (establishing predisposition by examining defendant’s criminal predisposition both before and after government inducement); *United States v. Gendron*, 18 F.3d 955, 962 (1st Cir. 1994) (determining predisposition by asking whether defendant would commit crime if received “proper” versus “improper” lure). The object is to convict “someone who would likely commit the crime under the circumstances and for the reasons normally associated with that crime, and who therefore poses the sort of threat to society that the statute seeks to control, and which the government, through the ‘sting’ seeks to stop.” *United States v. Gendron*, 18 F.3d 955, 962 (1st Cir. 1994). See generally LAFAVE, *supra* note 2, § 9.8(a)

Derivative entrapment is a defense that is available in some circuits when the government instructs an unsuspecting middleman to improperly induce an individual to commit a crime.²⁶ Other circuits refuse to acknowledge a derivative entrapment defense, particularly when the middleman is unaware that he is helping the government.²⁷ Of the circuits that recognize derivative entrapment, all require that the inducement originate with the government and that the government intend to target a pre-selected individual.²⁸

In gauging whether law enforcement improperly induced a defendant, federal courts have focused on the extent to which the government persuaded or instructed the middleman.²⁹ Additionally, courts have closely analyzed whether the middleman acted independently from the government's intended method of inducement.³⁰ Furthermore, some circuits have used policy grounds

(outlining factors to determine predisposition). Relevant factors to determine predisposition include: whether the defendant was already engaged in criminal activity for a profit, the character or reputation of the defendant, and the defendant's reluctance to commit the offense. *Id.*

26. See *United States v. Rogers*, 102 F.3d 641, 645 (1st Cir. 1996) (recognizing possibility of derivative entrapment defense when "unwitting government agent" induces third party); *United States v. Anderton*, 629 F.2d 1044, 1047 (5th Cir. 1980) (recognizing entrapment defense when government agent repeatedly pressures middleman to bring defendant into crime); *United States v. Valencia*, 645 F.2d 1158, 1168 (2d Cir. 1980) (extending entrapment defense to individual who was indirectly induced by government through third party); see also 21 AM. JUR. 2D *Criminal Law* § 248 (2007) (recognizing derivative entrapment defense in some circuits); LAFAVE, *supra* note 2, § 9.8(a) (defining derivative entrapment as government inducement of defendant through unsuspecting middleman); *Entrapment Through Middlemen*, *supra* note 21, at 1125 (identifying unanimous application of entrapment defense to government persuasion of unsuspecting middleman to induce defendant).

27. See *United States v. Squillacote*, 221 F.3d 542, 573 (4th Cir. 2000) (denouncing availability of derivative entrapment defense); *United States v. Thickstun*, 110 F.3d 1394, 1398-99 (9th Cir. 1997) (refusing to recognize entrapment by coconspirator unknowingly working for government). The court narrowly construed government inducement in entrapment to mean direct inducement by the government. *United States v. Thickstun*, 110 F.3d 1394, 1398-99 (9th Cir. 1997); see also *United States v. Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992) (denying derivative entrapment defense because lack of government contact with accused); *United States v. Emmert*, 829 F.2d 805, 808-09 (9th Cir. 1987) (extending entrapment defense only to cases of direct government inducement).

28. See *Sherman v. United States*, 356 U.S. 369, 374 (1958) (stating government's use of informant cannot justify later dissociation from informant); *United States v. Rogers*, 102 F.3d 641, 645 (1st Cir. 1996) (recognizing derivative entrapment defense when inducement derives from government involvement); 22 C.J.S. *Criminal Law* § 73 (2007) (explaining government use of unsuspecting third party renders such person irrefutable government agent); *Entrapment Through Middlemen*, *supra* note 21, at 1125 (rationalizing necessity of derivative entrapment defense when government uses middleman to induce targeted individual).

29. See *United States v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997) (holding entrapment defense available when government targets defendant by inducing middleman); see also *United States v. Rogers*, 102 F.3d 641, 646-47 (1st Cir. 1996) (illustrating improper inducement of middleman as threat of physical harm versus threat of pressure). The *Rogers* court accepted a government agent's threat to "put some heat on Rogers" as proper, whereas it rejected the suggestion to "put the arm on a target" as improper because the latter implied a threat of violence. *United States v. Rogers*, 102 F.3d 641, 646-47 (1st Cir. 1996) (internal quotation marks omitted); see also *United States v. Bradley*, 820 F.2d 3, 8 (1st Cir. 1987) (denying entrapment defense when middleman improperly induced defendant without government input).

30. See *United States v. Bradley*, 820 F.2d 3, 7 (1st Cir. 1987) (denying entrapment defense when government induced middleman who subsequently induced defendant not targeted by government). The entrapment defense does not extend to a defendant who was induced by a middleman in a manner not

to either support or bar claims of derivative entrapment.³¹ Moreover, emerging scholarly views indicate that the entrapment defense is on the decline and continued recognition of it is not in the public's best interest.³²

In *United States v. Luisi*, the court examined whether a jury should consider the derivative entrapment defense.³³ The court noted that a defendant is entitled to an entrapment instruction when he meets the burden of production on each of the two entrapment elements.³⁴ The court reasoned that Luisi satisfied the predisposition burden by testifying about a spiritual awakening steering him against drug dealing.³⁵ The court also noted two reasons why Luisi met his burden of showing that Previte improperly induced him to sell cocaine.³⁶ First, Previte exercised sufficient control over Merlino by merely asking him to order Luisi.³⁷ Secondly, Merlino's implied threat, by reason of his hierarchical position over Luisi, constituted an improper threat ultimately attributed to Previte because he expected delivery of the order.³⁸

contemplated by the government. *Id.* Compare *United States v. Washington*, 106 F.3d 983, 995 (D.C. Cir. 1997) (asserting same inducement must pass from middleman to targeted defendant), and *United States v. Layeni*, 90 F.3d 514, 520 (D.C. Cir. 1996) (qualifying entrapment defense as not extending to defendant if unwitting middleman induces "on his own"), with *Entrapment Through Middlemen*, *supra* note 21, at 1129 (arguing entrapment defense applies when middleman alters the government's inducement). The government can foresee that the middleman will induce the target and should not be able to escape an outcome that was created by government action. *Entrapment Through Middlemen*, *supra* note 21, at 1129.

31. Compare *United States v. Bradley*, 820 F.2d 3, 8 (1st Cir. 1987) (listing policy reasons for adopting derivative entrapment defense), with *United States v. Thickstun*, 110 F.3d 1394, 1399 (9th Cir. 1997) (outlining policy reasons for denying derivative entrapment defense), and *United States v. Washington*, 106 F.3d 983, 994 (D.C. Cir. 1997) (positing derivative entrapment designed to prevent government from "circumventing" entrapment defense by using unsuspecting middlemen). Allowing derivative entrapment would create an inconsistency because the third-party entrapment defense is not allowed when the middleman is entrapped. *United States v. Thickstun*, 110 F.3d 1394, 1399 (9th Cir. 1997). Moreover, courts never intended the entrapment defense to extend to criminals who are simply convinced by another criminal to commit a crime. *Id.* at 1399; see also Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 12-15 (2005) (illustrating policy concerns with entrapment including acquittal of criminals due to procedural concerns). The government is at an advantage when trying to avoid the entrapment defense because it is aware of improper inducement boundaries. Stevenson, *supra*, at 12-15; Nilsson, *supra* note 22, at 766-67 (opining derivative entrapment prevents government misconduct and luring of innocent individuals).

32. See Stevenson, *supra* note 31, at 75 (illustrating entrapment defense decline). Reasons for declined use of entrapment include the overly technical nature of the defense and a disparity of entrapment knowledge in which the government is at a great advantage over the average defendant. *Id.*; see also Stevenson, *supra* note 1, at 152-53 (opining entrapment defense is ineffective method of deterrent because it frees known criminals). Rather than freeing criminals, punishing individual officers would prove the better deterrent of police misconduct. Stevenson, *supra* note 1, at 152-53.

33. 482 F.3d at 53-54.

34. *Id.* at 58 (ruling entrapment instruction warranted when defendant produces "some evidence" substantiating entrapment defense). The First Circuit requires the defendant to satisfy both entrapment prongs. *Id.*

35. *Id.* (noting Luisi's testimony about spiritual awakening was scintilla of evidence).

36. *Id.* at 56 (concluding Previte improperly induced Luisi).

37. See 482 F.3d at 56 (interpreting *Rogers* to mean government need only request middleman to give improper inducement). The court determined that the government conveys an improper inducement by asking the middleman to improperly induce the defendant. *Id.*

38. See *id.* at 53 (describing Merlino's order to Luisi as "implied threat of physical harm"); *id.* at 56

The court also balanced the competing social policies of protecting law enforcement interests in prosecuting “victimless” crimes versus protecting innocent individuals from government-manufactured crime.³⁹ The court determined that the government is involved when it directs a middleman to deliver an expected improper inducement.⁴⁰ The court also expressed concern over government involvement that turns innocent individuals into criminals.⁴¹ Ultimately, the court favored these policy interests over protecting the interest of law enforcement through the conviction of individuals who exhibit socially unacceptable behavior.⁴²

Utilizing the scintilla of evidence standard, the court appropriately concluded that Luisi met his burden of production on the issue of predisposition.⁴³ An identical result would have ensued had the court applied the reasonable juror standard, as established in the entrapment case *United States v. Pratt*.⁴⁴ This standard was satisfied because a rational juror could believe that Luisi was not predisposed to commit the drug deal with McGowan because Luisi’s self-proclaimed spiritual awakening was corroborated with evidence that he forestalled the transaction until Merlino became involved.⁴⁵ Furthermore, the court properly disregarded the government’s use of a middleman, on the issue of predisposition, because enough evidence existed to create an inference that Luisi would not have committed the drug deal absent any improper government involvement.⁴⁶

Additionally, the court broadly interpreted *United States v. Rogers*⁴⁷ to

(outlining court’s conclusion that Previte delivered an implied threat because he asked Merlino to order Luisi). Improper inducement does not exist when the middleman improperly induces defendant in a manner not contemplated by government. *Id.* at 57.

39. *Id.* at 52 (weighing competing social policies in analyzing entrapment ruling).

40. *Id.* at 56 (adopting *Bradley* policy of “attenuated” government involvement when agent does not expect to induce defendant).

41. 482 F.3d at 56 (expressing concern about corrupting innocent citizens).

42. *See id.* at 54 (listing *Bradley* policy considerations). The court adopted the *Bradley* policies favoring a derivative entrapment instruction while omitting analysis of the policies disfavoring entrapment. *Id.* at 56.

43. *See id.* at 58 (establishing Luisi’s predisposition burden of production met by presentation of mere scintilla of evidence). The fact that Luisi offered some evidence that he was not predisposed, as corroborated by his overall reluctance in dealing cocaine with McGowan, sufficiently satisfies his burden of production on the predisposition prong. *Id.*; *see also* *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir. 1994) (deeming burden of production satisfied with showing of mere scintilla of evidence).

44. 913 F.2d 982, 988 (1st Cir. 1990) (recognizing burden of production satisfied only when reasonable juror can believe evidence). The defendant must offer believable evidence creating a reasonable doubt that they are not predisposed. *Id.*

45. *See* 482 F.3d at 49 (noting Luisi’s claim of a spiritual awakening to not deal drugs); *id.* at 58 (acknowledging Luisi’s initial reluctance to deal with his immediate drug deal following Merlino’s order).

46. *See* *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (requiring defendant’s predisposition originate outside of government’s scheme to ensnare); *United States v. Gendron*, 18 F.3d 955, 962 (1st Cir. 1994) (analyzing predisposition by asking whether defendant would have committed crime in question if properly induced). A defendant lacks predisposition if he would not otherwise commit a crime that the government provided an opportunity to commit. *United States v. Gendron*, 18 F.3d 955, 962 (1st Cir. 1994).

47. 102 F.3d 641 (1st Cir. 1996).

establish that Merlino's order to Luisi contained an implied threat, which was attributed to the government due to Previte's request.⁴⁸ The court's conclusion that Previte's request of Merlino to order Luisi constituted an implied threat is inconsistent with *Rogers*'s rejection of the sufficiency of an implied threat to establish improper inducement.⁴⁹ Similar to the government agent in *Rogers*, Previte lacked any apparent intent to use force when he asked the middleman to pressure the defendant.⁵⁰ Instead of using an implied threat to establish improper inducement, the First Circuit should have focused on the unfair advantage that the government gained when it used Merlino's position as an LCN captain to induce Luisi to sell cocaine.⁵¹

The court was within its authority to mold the derivative entrapment defense as a means to address its social concerns.⁵² Weighing the various policies within its precedent and looking to various circuits for guidance, the First Circuit explicitly recognized the derivative entrapment defense for the first time.⁵³ This holding has the potential to deter police misconduct by promoting cautious use of inducements in order to protect the rights of innocent citizens.⁵⁴ The holding also produces, however, the undesirable side effect of allowing known criminals to go free.⁵⁵ In order to avoid acquitting criminals as a means of deterring entrapment, future efforts should focus on developing alternative systems, such as individual punishment of police officers.⁵⁶

48. See *supra* note 37 and accompanying text (referencing court's application of *Rogers* to establish government's improper inducement of Luisi).

49. See 482 F.3d at 56 (categorizing Previte's request that Merlino order Luisi as implied threat of harm); *United States v. Rogers*, 102 F.3d 641, 645-46 (1st Cir. 1996) (describing improper inducement as implied threat explicitly referring to use of violence); *supra* note 37 and accompanying text (recounting *Luisi* court's declaration that government need only request improper inducement).

50. See *supra* text accompanying note 13 (detailing Previte's request to Merlino); see also *United States v. Rogers*, 102 F.3d 641, 645 (1st Cir. 1996) (explaining agent did not improperly induce when suggesting middleman pressure defendant without using violence).

51. See *United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir. 1994) (explaining improper inducement as government using an unfair advantage over defendant); *supra* note 26 and accompanying text (explaining derivative entrapment defense established in *Rogers*); *supra* note 38 and accompanying text (explaining *Luisi* court's reasoning that Merlino's order was implied threat resulting from hierarchy).

52. See *Entrapment Through Middlemen*, *supra* note 21, at 1125 (noting judicially created defense of entrapment); *supra* note 22 and accompanying text (examining entrapment as non-constitutional and subject to judicial modification).

53. See *supra* note 6 (discussing policy reasons supporting and opposing derivative entrapment); see also Roiphe, *supra* note 21, at 288 (explaining entrapment policy originated with concern about preventing police misconduct). Compare *United States v. Rogers*, 102 F.3d 641, 645 (1st Cir. 1996) (recognizing future availability of third party entrapment defense in First Circuit), with *supra* note 27 and accompanying text (recognizing policies of jurisdictions denouncing derivative entrapment).

54. See *supra* note 1 and accompanying text (noting goal of entrapment defense is to prevent police from manufacturing crimes); *supra* note 6 (explaining entrapment defense meant to protect innocent individuals from criminal schemes); see also Nilsson, *supra* note 22, at 766-69 (asserting rationale of entrapment defense is deterrence of police misconduct).

55. See Stevenson, *supra* note 1, at 152-53 (noting entrapment defense's negative side effect of producing acquittal of known criminals).

56. See Stevenson, *supra* note 1, at 152-53 (arguing entrapment ineffective deterrent of police misconduct).

In *Luisi*, the First Circuit adopted the derivative entrapment defense to favor the social policy of protecting innocent citizens from government-manufactured crimes. The court appropriately reasoned that Luisi met his predisposition burden despite his involvement in the LCN. Although it was within the court's discretion to mold the entrapment defense as it did, the court unnecessarily stretched its reasoning to establish that a government agent's mere suggestion of an implied threat sufficiently constitutes an improper inducement. Alternatively, the court should have recognized that the government improperly induced Luisi because Previte's use of a middleman created an unfair advantage over Luisi. Instead of extending their reasoning to recognize derivative entrapment, courts should encourage law enforcement agencies to sanction officers whose misconduct constitutes entrapment. Adoption of such a policy would protect defendants from government-manufactured crime without causing the undesirable side effect of exonerating known criminals.

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