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# VIRTUAL LOLLIPOPS AND LOST PUPPIES: HOW FAR CAN STATES GO TO PROTECT MINORS THROUGH THE USE OF INTERNET LURING LAWS

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*"Bitter are the tears of a child: Sweeten them.  
Deep are the thoughts of a child: Quiet them.  
Sharp is the grief of a child: Take it from him.  
Soft is the heart of a child: Do not harden it."*<sup>1</sup>

## I. INTRODUCTION

Courtney, a thirteen year old, spends her free time like many American youth today: on the Internet.<sup>2</sup> This spring, while in a chat room for teens in her

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<sup>1</sup> Quote from PAMELA GLENCONNER, *in* THE SAYINGS OF CHILDREN WRITTEN DOWN BY THEIR MOTHER (1918), available at <http://www.wisdomquotes.com/000708.html>.

<sup>2</sup> See Perverted-Justice.com, <http://perverted-justice.com> (last visited Jan. 26, 2006). Courtney is actually a volunteer for Perverted-Justice.com, a volunteer organization launched in 2003 that tracks sexual predators on the Internet. *Id.* The volunteers pose as children in chat rooms and converse with alleged sexual predators who initiate conversations with them. Once a predator solicits and shows a clear intent to meet the volunteer, Perverted-Justice.com verifies the information by having a volunteer with a child-like voice contact the predator on the phone. *Id.* Afterwards, Perverted-Justice.com contacts the local police with the information and evidence, and posts chat logs on the Perverted-Justice.com database. *Id.* Perverted-Justice.com facilitated forty convictions between June of 2003 and January 1, 2006. *Id.* Additionally, Dateline NBC has worked with this group on three occasions to inform the public of the threat Internet predators pose by having the predators come to a house where the predators believe they are meeting a minor for a sexual encounter. Instead, the predators are greeted by the show's host and television cameras. *Id.*

region of California, Courtney received a private message from “flamingdonkeybutt”<sup>3</sup> who identified himself as a twenty-four year old male from her area wanting to chat.<sup>4</sup> Within three minutes of talking to Courtney, this individual asks her if she would like to see his penis, proceeds to turn on his webcam, and sends her a picture of his penis.<sup>5</sup> A few minutes later, he asks Courtney for her address in order to visit her and let her see his penis in person.<sup>6</sup> As the day goes on, this pedophile decides he wants Courtney to visit him and asks if she can hitchhike to his home.<sup>7</sup> As the conversation continues, it becomes more graphic, with the predator asking Courtney if he can “play with whats [sic] in ur [sic] pants” when they meet.<sup>8</sup> After talking online for three days, he is able to convince Courtney to meet him at a local mall.<sup>9</sup> When this pedophile arrives at the mall expecting to meet Courtney, local police officers arrest him for attempting to distribute pornographic materials to a minor and attempting to molest a child.<sup>10</sup> Eventually, he decides to plead guilty of attempting to distribute pornographic materials to a minor.<sup>11</sup> One in four youth experiences something similar while on the Internet.<sup>12</sup>

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<sup>3</sup> Internet users create usernames or screen names to identify themselves on the Internet. Oftentimes these screen names reflect the identity of the user by containing part of a name, nickname, year of birth, or special interest. For a definition of username, see PCMAG.com, Encyclopedia, <http://www.pcmag.com/encyclopedia> (type “username” in search box) (last visited Jan. 24, 2006).

<sup>4</sup> Perverted-Justice.com, Personal message from “flamingdonkeybutt,” <http://www.perverted-justice.com/?archive=flamingdonkeybutt> (Mar. 29, 2005).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Perverted-Justice.com, Conviction—“flamingdonkeybutt”—Santa Rosa, California, <http://www.perverted-justice.com/?con=flamingdonkeybutt> (last visited Jan. 4, 2006).

<sup>11</sup> *Id.*

<sup>12</sup> DAVID FINKELHOR ET AL., NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION: A REPORT ON THE NATION’S YOUTH 1 (2000), [http://www.missingkids.com/en\\_US/publications/NC62.pdf](http://www.missingkids.com/en_US/publications/NC62.pdf).

Our society exists in two spheres: a physical world and a virtual world.<sup>13</sup> In the physical world, there are places for youth<sup>14</sup> to play where parents know their children are safe. Places in the physical world containing individuals, materials, and experiences that are harmful to youth are frequently limited to adult access or require a parent's permission for youth to enter, such as a bar. This is not always true in the virtual world of the Internet.<sup>15</sup> On the Internet, youth are in danger of stumbling upon harmful materials by misspelling a word or chatting with strangers and may also access harmful material on their own initiative.<sup>16</sup> As more youth access the Internet to work on school projects, play video

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<sup>13</sup> See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, COMPUTER USE IN THE UNITED STATES: 2003 CURRENT POPULATION REPORTS (2005) [hereinafter COMPUTER USE IN THE UNITED STATES: 2003], available at <http://www.census.gov/prod/2005pubs/p23-208.pdf>. The most recent census data for 2003 shows 70 million homes in the United States have computers. *Id.* Internet use is also quickly increasing. In 2000, 44 million households connected to the Internet at home. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000 CURRENT POPULATION REPORTS (2001), available at <http://www.census.gov/prod/2001pubs/p23-207.pdf>. This was nearly double the number of households connected to the Internet in 1998. In 2001, 51 million homes were connected to the Internet showing the rapid growth of the Internet. COMPUTER USE IN THE UNITED STATES: 2003, *supra*. Finally in 2003, 62 million homes were connected to the Internet. Additionally, children are not strangers to the Internet: 18 million children, age three to seventeen, used the Internet in 2000. The number of children on the Internet more than doubled in 2001 to 37 million users. *Id.*

<sup>14</sup> The term youth will be used throughout this Comment since pedophiles who use Internet luring generally target pre-teens and teens. See LAURA CHAPPELL & BRENDA CZECH, PROTOCOL ANALYSIS INST., LLC, INTERNET SAFETY FOR KIDS, A PRESENTATION FOR ADULTS 10 (2005), <http://www.packet-level.com/kids/iskbook/isk091705.pdf> (finding eleven to fourteen year olds are the target of most Internet luring); see also FINKELHOR ET AL., *supra* note 12, at 2 (showing the majority of the youth who received sexual solicitations were between the age of fourteen and seventeen).

<sup>15</sup> See WENDY LAZARUS ET AL., CHILDREN'S P'SHIP, MEASURING DIGITAL OPPORTUNITY FOR AMERICA'S CHILDREN: WHERE WE STAND AND WHERE WE GO FROM HERE 30 (2005), <http://www.childrenpartnership.org/AM/Template.cfm?Section=Reports1&Template=/CM/ContentDisplay.cfm&ContentFileID=1089> (finding Americans are concerned about the risks the Internet poses to children).

<sup>16</sup> FINKELHOR ET AL., *supra* note 12, at 14–15, 32. The majority of youth come across harmful material while surfing the Internet. Additionally, misspelling and links in other websites caused 34% of youth to view harmful material. Only 8% of youth purposely visited an adult site. *Id.* at 14–15. Pornographic websites often use common words or slight variations of words in their Internet cites. For example, one teen encountered a pornographic website when she accidentally added an extra "e" to the word teen. *Id.*

In an effort to protect children from viewing harmful materials through misspelling and searching, Congress passed the Truth in Domain Names Act (to be codified at 18 U.S.C. § 2252B). This act makes it a crime to use a misleading domain name as a scam to lure people to a pornographic website. For example, children who were researching the President of the United States and went to the website <http://www.whitehouse.com> instead of <http://www.whitehouse.gov> would enter a pornographic website and not a website about the White House. This website no longer contains pornography, but instead offers a service to search public records. See Michael Honing, Comment, *The Truth About the Truth in Domain Names Act: Why This Recently Enacted Law Is Unconstitutional*, 23 J. MARSHALL J.

games, and chat with friends, ensuring their safety is an imperative public policy goal.<sup>17</sup>

Youth and parents have a false sense of safety on the Internet because often-times the person with whom they communicate lives far away.<sup>18</sup> The Internet has proven to be an effective tool for sexual predators in grooming youth they want to sexually abuse because such predators may easily send sexually explicit material in real time to a minor.<sup>19</sup> To groom minors, sexual predators may send sexual pictures and website addresses with the hope that the content will make the minor believe sexual acts between youth and adults are common and enjoyable.<sup>20</sup> The Internet offers sexual predators an effective means to find and groom their victims by offering access to a large number of people, allowing for a sense of anonymity and providing a simple way to share data and images.

In addition, sexual predators use the anonymous nature of the Internet to their advantage by creating an identity that may not cause youth to be alarmed.<sup>21</sup> "Don't talk to strangers" is a rule that many youth have learned to apply in the physical world but may not apply when they are on the Internet<sup>22</sup>

COMPUTER & INFO. L. 141 (2004) (discussing the overbreath and vagueness of the Truth in Domain Names Act, rendering it unconstitutional).

<sup>17</sup> COMPUTER USE IN THE UNITED STATES: 2003, *supra* note 13, at 9 (finding the most common use of the Internet is to complete school assignments, followed by playing games, and communication through e-mail or instant messaging).

<sup>18</sup> Janis Wolak et al., *Internet-Initiated Sex Crime Against Minors: Implications for Prevention Based on Findings from a National Study*, 35 J. OF ADOLESCENT HEALTH 424.e11, 424.e17 (2004) (finding most predators live about fifty miles away from their victims and are often in other states).

<sup>19</sup> "Grooming" is a process by which sexual offenders use pictures and conversations to "[i]nterest a victim in or overcome inhibitions about sexual activity." JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 18 (2005) [hereinafter FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY], [http://www.ncmec.org/en\\_US/publications/NC144.pdf](http://www.ncmec.org/en_US/publications/NC144.pdf).

<sup>20</sup> These pictures usually show children having fun while participating in sexual activities. When children see their peers having fun they are more likely to be open to trying the activity. National Center for Missing & Exploited Children, *Pornographic Images of Children*, [http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=1504](http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1504) (last visited Nov. 5, 2005); EVA J. KLAIN ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE 6* (2001), [http://www.ncmec.org/en\\_US/publications/NC81.pdf](http://www.ncmec.org/en_US/publications/NC81.pdf).

<sup>21</sup> See *infra* note 54 and accompanying text.

<sup>22</sup> See LAZARUS ET AL., *supra* note 15, at 30. Many of the safety characteristics children use to determine whether a stranger is safe disappear on the Internet. Children cannot tell if the person they are talking to online is an adult or peer. Children are taught that some strangers are there to help, such as teachers and police, and may be considered safe. On the Internet, a minor cannot verify if someone really is one of those safe people. The majority of parents are afraid a stranger will contact their child online and their worries are well-founded. *Id.*

consequently youth may become susceptible to the many sexual predators that use the Internet to find their next victim.

The federal government recognizes the dangers the Internet presents to youth but has failed to regulate the information youth may access on the Internet.<sup>23</sup> Federal statutes regulating inappropriate content for youth on the Internet have failed to pass First Amendment scrutiny. Although protecting the youth from such content is a compelling interest Congress is unable to find a less restrictive means to protect youth from harmful material on the Internet.<sup>24</sup> Many states have also responded to Internet dangers with laws which criminalize Internet conduct that solicits sexual acts from a child or lures him or her away from home.<sup>25</sup> The states have not always succeeded because the Internet has an interstate aspect and unlike the federal government, states must contend with the dormant Commerce Clause in regulating the Internet.<sup>26</sup>

Despite the failures of both the federal and state governments in regulating the Internet, individual states have and will continue to enact legislation to regulate the Internet in an attempt to protect youth.<sup>27</sup> For example, California proposed an amendment to its Internet luring statute in 2005 that would criminalize the first contact or communication a sexual predator has with the intent to sexually abuse a minor.<sup>28</sup> How far may states take Internet regulation before the federal government opts to take control of the situation? What does the future look like for youth who will grow up in a world where Internet usage is becoming more prevalent?

Part II of this Comment provides background on the victimization of youth on the Internet and Internet luring. Part III examines ways in which Congress has attempted to provide widespread Internet protection for youth. Part IV discusses actions taken by individual states to protect youth on the Internet, including enacting content-based regulations and statutes to prevent Internet luring. Part V shows how the proposed amendment to California's Internet luring law does not survive constitutional scrutiny. There is a need for the current

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<sup>23</sup> See discussion *infra* Part III.

<sup>24</sup> See cases cited *infra* note 82.

<sup>25</sup> *E.g.*, ALA. CODE § 13A-6-110 (Lexis Nexis 2005); ARIZ. REV. STAT. ANN. § 13-3554 (2001); ARK. CODE ANN. § 5-27-402 (1997); CONN. GEN. STAT. § 53a-90a (2001); DEL. CODE ANN. tit. 11, § 1112A (2001); D.C. CODE § 22-3010 (2001); FLA. STAT. § 847.0135 (2000); GA. CODE ANN. § 16-12-100.2 (2003); IDAHO CODE ANN. § 18-1509A (2004); 720 ILL. COMP. STAT. 5/11-6-11-20.1 (2002); MICH. COMP. LAWS. § 750.145d (2004); MONT. CODE ANN. § 45-4-625 (2005); N.J. STAT. ANN. § 2C:24-4 (West 2005); N.C. GEN. STAT. § 14-202.3 (2005); OKLA. STAT. tit. 21, § 1021(B) (2002); OR. REV. STAT. § 163.688, 689 (2003); VA. CODE ANN. § 18.2-374.3(A)(B) (2004).

<sup>26</sup> See discussion *infra* Parts IV.A.2, B.2. The dormant Commerce Clause has been read into the Constitution as a restriction on state legislatures to regulate interstate commerce.

<sup>27</sup> See discussion *infra* Parts IV.A.2, B.2.

<sup>28</sup> See source cited *infra* note 207.

Internet luring legislation to be amended in order to provide more protection for youth on the Internet. This should be done on a national level due to the decentralized nature of the Internet. The amendment proposed by California provides a model for Congress in creating this needed piece of legislation.

## II. INTERNET LURING: THE VICTIMS, OFFENDERS, AND THE LURING PROCESS

### A. The Victims

A sexual predator approaches one in five youth on the Internet.<sup>29</sup> The National Center for Missing and Exploited Children found that one in every four youth who received sexual solicitations over the Internet reported these incidents to be troubling or scary.<sup>30</sup> Although sexual predators are more likely to target girls, a large percentage of boys are also the target of unwanted sexual solicitations.<sup>31</sup> The majority of the youth who receive sexual solicitations are over the age of fourteen.<sup>32</sup> Youth under fourteen years of age are also targets and experience more distress when contacted by a sexual predator.<sup>33</sup> Internet

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<sup>29</sup> FINKELHOR ET AL., *supra* note 12, at 1 (findings of youth age ten to seventeen during a study completed in 2000).

<sup>30</sup> *Id.* Additionally, one in seven of all youth receiving solicitations said the individual tried to contact them on the phone or through standard mail after they met on the Internet. *Id.*

<sup>31</sup> *Id.* at 2. In this study, girls were targeted in 66% of occurrences compared to boys in 34% of occurrences. *Id.* The number of boys targeted is significant because one common misconception is that boys are not frequently targets. *Id.* Sexual offenders who prefer male children are more likely to collect child pornography and have more victims than other sexual predators. Additionally, boys are less likely to report their victimization. JAMES F. McLAUGHLIN, KEENE POLICE DEP'T, CYBER CHILD SEX OFFENDER TYPOLOGY [hereinafter OFFENDER TYPOLOGY], <http://www.ci.keene.nh.us/police/Typology.html> (last visited Nov. 9, 2005).

<sup>32</sup> National Center for Missing & Exploited Children, What Is Online Enticement of Children for Sexual Acts, [http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=1503](http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1503) (last visited Nov. 7, 2005) (finding teenagers are more at risk because they are often on the Internet unsupervised and are more likely to engage in conversations of a sexual nature). The National Center for Missing and Exploited Children also provides resources for teens and parents on how to protect oneself on the Internet from harmful individuals and materials. See LAWRENCE J. MAGID, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, TEEN SAFETY ON THE INFORMATION HIGHWAY 11-12 (2003) [hereinafter TEEN SAFETY], [http://www.ncmec.org/en\\_US/publications/NC57.pdf](http://www.ncmec.org/en_US/publications/NC57.pdf); LAWRENCE J. MAGID, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD SAFETY ON THE INFORMATION HIGHWAY (2005) [hereinafter CHILD SAFETY], [http://www.ncmec.org/en\\_US/publications/NC03.pdf](http://www.ncmec.org/en_US/publications/NC03.pdf).

<sup>33</sup> FINKELHOR ET AL., *supra* note 12, at 2; see also Wolak et al., *supra* note 18, at 424.e19 (finding that none of the victims in Internet sex crimes were under age twelve and the majority ranged from thirteen to seventeen years old). Most of the legislation passed by

regulations created to protect youth need to focus on teenagers as much as they aim to protect younger children.<sup>34</sup>

There are four populations of youth who seem to be the most vulnerable to sexual predators on the Internet. These youth have different insecurities that sexual predators use to their advantage.<sup>35</sup> The first group consists of youth who have a poor relationship with their parents.<sup>36</sup> Many of these youth use the Internet as a place to find peers who are in a similar situation. Sexual predators take advantage of this group by giving them the attention that they may not receive at home.<sup>37</sup>

The second group of youth is composed of minors who are lonely or depressed.<sup>38</sup> These youth also look for peers who can relate to their experiences and feelings. The Internet gives them access to many people with whom they would otherwise not be able to connect.<sup>39</sup>

Boys who are gay or confused about their sexuality comprise the third group targeted by sexual predators.<sup>40</sup> These youth utilize the Internet as a place to learn more about their sexual orientation and explore their homosexuality.<sup>41</sup> This group is already searching for sexually-related information and may welcome some of the sexual advances made by sexual predators.<sup>42</sup>

The fourth group of minors will develop strong attachments to the sexual predator they have met online and may not understand that the sexual predator is breaking the law.<sup>43</sup> These victims are known as “compliant” or “statutory” because they assist offenders and will often oppose any investigation and

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Congress focuses on children under the age of thirteen. For example, the Children’s Online Privacy Protection Act requiring parental permission when websites request information from children under age thirteen and the Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317 § 2, 116 Stat. 2767 (codified at 47 U.S.C. § 941 (Supp. I 2003)). See discussion *infra* note 139. These provisions work to protect children under thirteen but there needs to be protection for those children between fourteen and seventeen years old.

<sup>34</sup> CHAPPELL & CZECH, *supra* note 14, at 10 (finding the perfect victim is eleven to fourteen years old, has little or no parental involvement, no definite bedtime, whose parents do not always know where he or she is, and has exclusive use of the computer in a private area). Younger children typically have more supervision when they are on the Internet. Teenagers and older children are able to use the Internet without parental assistance or supervision. Older children also are more likely to have computers in their rooms or use computers in secluded areas of the house, allowing them to talk to strangers and view inappropriate websites. See What is Online Enticement of Children for Sexual Acts, *supra* note 32.

<sup>35</sup> Wolak et al., *supra* note 18, at 424.e19.

<sup>36</sup> *Id.* (finding adolescents reporting problems with their parents, minimal monitoring by adults, and depression are more likely to form close online relationships).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

prosecution.<sup>44</sup> Due to their attachment to the offender, these minors will not tell an adult about their Internet experience because they do not view the behavior as wrong.<sup>45</sup>

Most youth are at home when they encounter Internet sexual predators.<sup>46</sup> Many of the youth, who are approached by a sexual predator, discover these individuals while they are in chat rooms.<sup>47</sup> Several of these chat rooms are oriented towards topics that interest youth; however, some chat rooms in which youth participate are focused towards sexual encounters.<sup>48</sup>

Youth often do not tell anyone about their sexual encounters on the Internet despite the resulting negative effect.<sup>49</sup> It is questionable whether parents know what to do if their child reports an incident of sexual solicitation.<sup>50</sup> Parents and children may report incidents of child sexual exploitation to the CyberTipline operated by the National Center for Missing and Exploited Children.<sup>51</sup> Because of their lack of awareness, many parents may not know the appropriate authorities to contact. As a result, the sexual predator fades into cyberspace obscurity.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> FINKELHOR ET AL., *supra* note 12, at 3 (finding 70% of reported incidents of sexual solicitations happened while the child was at home and 22% happened while the child was at another person's home). Of children enrolled in grades Kindergarten–12 in 2003 83.4% used computers at home and 92.3% used computers at school. COMPUTER USE IN THE UNITED STATES: 2003, *supra* note 13, at 7.

<sup>47</sup> FINKELHOR ET AL., *supra* note 12, at 2. (finding the majority of incidents begin in a chat room as opposed to instant messaging). Chat rooms allow Internet users to talk with each other in a party-like setting. Everything that one types in a chat room is immediately displayed to the group. There are some chat rooms that have monitors who may block someone from participation, but this can only happen after that individual acts in an inappropriate manner. Wolak et al., *supra* note 18, at 424.e15.

<sup>48</sup> Wolak et al., *supra* note 18, at 424.e15. These chat rooms are oriented to age groups, geographic locations, dating, topics of interest such as sports or extracurricular activities, and sexual encounters between adults and minors. *See also* CHAPPELL & CZECH, *supra* note 14, at 3 (showing the frequency of solicitations by creating an Internet profile for a fictitious thirteen year old and entering a chat room where, during a three-hour period, the "child" received five solicitations, including one from a man who stated he was attracted to girls aged eight to ten years old).

<sup>49</sup> FINKELHOR ET AL., *supra* note 12, at 5 (finding the victim was very upset in 20% of the cases in which they were contacted by sexual predators and in 13% of the cases victims were scared by the predator). As the sexual predator became more aggressive, the youth's fear would rise significantly. Finally, many youth who are contacted by a sexual predator report feeling symptoms of stress. *Id.*

<sup>50</sup> *Id.* at 29 (finding two-thirds of parents do not know where to report harmful material on the Internet or incidents with sexual predators).

<sup>51</sup> The National Center for Missing and Exploited Children's CyberTipline is a reporting service for leads pertaining to sexual exploitation of children. The leads received by the CyberTipline include: the possession, manufacture, and distribution of child pornography, online enticement of children for sexual acts, child prostitution, child sex tourism, and child sexual molestation outside the family. *See* National Center for Missing & Exploited Children CyberTipline, <http://www.cybertipline.com> (last visited Oct. 30, 2005).



Consequently, the child may not report future sexual advances.

## B. The Sexual Predators

Sexual predators do not have obvious characteristics that distinguish them from others on the street; however, as more research is conducted, a profile for “technophilia” is emerging.<sup>52</sup> Many sexual predators are young adults between the age of eighteen and twenty-five.<sup>53</sup> Many offenders who are older do not lie about their age, and those sexual predators that do lie about their age usually do not portray themselves as minors but claim to be closer to their true age.<sup>54</sup>

A study of child sex offenders conducted by the police department of Keene, New Hampshire found that there are four different typologies of sexual offenders: collectors, travelers, manufactures, and chatters.<sup>55</sup> Those offenders who fall into the “collectors” category collect child pornography and many are first-time offenders.<sup>56</sup> The study found that many people who normally would not have collected child pornography did so because they believe that the Internet allows them to remain anonymous.<sup>57</sup> The “travelers” are one of the most dangerous types of sexual predators because they are willing to travel distances to meet a child and are therefore not limited to the immediate area around their

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<sup>52</sup> JAMES F. MCLAUGHLIN, KEENE POLICE DEP'T, *TECHNOPHILIA: A MODERN DAY PARAPHILIA* [hereinafter *TECHNOPHILIA*], <http://www.ci.keene.nh.us/police/technophilia.html> (last visited Nov. 9, 2005). Coining the term “technophilia” to describe the behavior of individuals who use computers to participate in sexual deviance. *Id.* This report also includes a chart of characteristics of sexual offenders investigated between May 1997 and February 1998 in Keene, New Hampshire. *Id.*

<sup>53</sup> FINKELHOR ET AL., *supra* note 12, at 3. Additionally, half of those sexual predators who are aggressive in their solicitations of minors on the Internet are juveniles. *Id.*

<sup>54</sup> Wolak et al., *supra* note 18, at 424.e15. A quarter of offenders took a few years off their true age but were still older than the age they claimed. For example, men who were forty-five told victims they were thirty-five. *Id.*; see also *TECHNOPHILIA*, *supra* note 52. There are some older sexual predators who impersonate children online and have created a full identity, including a personal history and pictures, which they maintain online. After a while these individuals may assess how the child with whom they are speaking online feels about having sex with someone who is older. If there is a positive response, then the sexual predator will reveal their true identity. *Id.* Alternatively, there are offenders that are truthful about their identity and pedophilia. *Id.*

<sup>55</sup> OFFENDER TYPOLOGY, *supra* note 31, at 1–2. The study focused on 200 offenders from forty different states and twelve foreign countries. These offenders ranged in age from thirteen to sixty-five with a median age of forty-five.

<sup>56</sup> See *id.* at 3 (“Most of these offenders do not have any prior contact with law enforcement or have had any known illegal contact with children.”). *But see* FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY, *supra* note 19, at 18 (finding one out of six, or greater, cases that originate with an investigation of child pornography finds the offender has also victimized children).

<sup>57</sup> OFFENDER TYPOLOGY, *supra* note 31, at 5.

homes.<sup>58</sup> These sexual predators typically arrange to meet a child at a public location or at home when their parents are gone.<sup>59</sup> The sexual predators that fall into the “manufacturers” category manufacture and distribute child pornography.<sup>60</sup> Manufacturers are always considered to be part of the collectors group.<sup>61</sup> Of the four typologies, manufactures are more likely to have a criminal history of sexually abusing youth.<sup>62</sup> Finally, “chatters” are not involved with child pornography but portray a trustworthy image on the Internet to create friendships with minors that evolve into sexual abuse.<sup>63</sup> These sexual predators usually do not have an interest in meeting the child in person, but their relationships with youth often involve phone conversations and phone sex.<sup>64</sup>

### C. The Luring Process

There are many steps sexual predators might take in luring a child from the Internet to meet in person for sexual activities.<sup>65</sup> This process differs between sexual predators, however, all Internet luring begins with the befriending proc-

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<sup>58</sup> *Id.* This New Hampshire study had four offenders come from another country to meet their victims and the other “travelers” represented ten different states. These offenders also are the most successful compared to the others. For example, the Keene, New Hampshire police department recovered over twenty-five transcripts of conversations with minors from on offender’s computer that included the minors’ name, directions to their homes, and the story the minor was going to use to get away from home. *Id.*

<sup>59</sup> CHAPPELL & CZECH, *supra* note 14, at 13.

<sup>60</sup> OFFENDER TYPOLOGY, *supra* note 31, at 6–7.

<sup>61</sup> CHAPPELL & CZECH, *supra* note 14, at 13.

<sup>62</sup> OFFENDER TYPOLOGY, *supra* note 31, at 7–8.

<sup>63</sup> *Id.* This group spends most of its free time on the Internet (as much as twelve hours a day or more). In addition, they present themselves as “teachers” “and offer, and, at times, insist they be asked questions, on any subject, preferably sex.” *Id.*

<sup>64</sup> *Id.* Most offenders will engage in cybersex and after some rapport is built up over time, they attempt to escalate the contact to telephone. After a period of normal telephone conversation, they attempt to escalate this into phone sex. Many of the state Internet luring statutes require a sexual predator to meet with a child (or at least make arrangements). *See* statutes cited *supra* note 25. In these states, this group of sexual predators would not be prosecuted for Internet luring. However, the proposed California amendment would allow these offenders to be prosecuted on the basis of their contact with the minor and intent to commit a sex-based crime. *See* source cited *infra* note 207.

<sup>65</sup> CHAPPELL & CZECH, *supra* note 14, at 14 (recognizing that there are six steps usually taken by a sexual predator in luring a child on the Internet: (1) befriending; (2) making an offer; (3) incriminating evidence; (4) contact; (5) guilt and threats; (6) the truth, based on MISSING, a game created to teach children about Internet luring). MISSING is based on a true story about a boy who spent most of his free time on the Internet talking to strangers and was lured away from his home by one of the people he met online. The objective of the game is for the children to help the police find the missing boy before the sexual predator successfully crosses the border into Mexico. MISSING can be found online at <http://www.livewwwires.com>. *See also* OFFENDER TYPOLOGY, *supra* note 31.

ess.<sup>66</sup> The offender will use a child's online profile to learn of the child's likes and dislikes and will then portray many of these same characteristics.<sup>67</sup> In addition, sexual predators will ask the child a number of personal questions when they first meet to learn about the minor's insecurities.<sup>68</sup> This aspect of the luring process usually lasts at least a month with the sexual predators spending time creating a relationship and testing the victim's limits.<sup>69</sup> The purpose of the courting period is to groom the child for sexual activities and to form a relationship with the child.<sup>70</sup> This relationship is not confined to the Internet. Many sexual predators will talk to their victims on the phone and send them gifts in the mail.<sup>71</sup>

Once the befriending process has concluded, individuals who target and lure youth on the Internet frequently reveal their sexual motives.<sup>72</sup> The majority of offenders introduce sexual topics to minors with whom they communicate and most of these conversations focus on sexual topics.<sup>73</sup> For example, a substantial number of sexual solicitations are requests to have "cyber sex"<sup>74</sup> and many predators are successful in their attempts—one in five minors respond to such requests.<sup>75</sup>

The luring process often culminates in face-to-face meetings with sexual predators.<sup>76</sup> The offenders and victims typically live within a few hours of each other.<sup>77</sup> There are a few offenders who will travel across state lines to meet a

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<sup>66</sup> CHAPPELL & CZECH, *supra* note 14, at 15.

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *Id.*

<sup>69</sup> Wolak et al., *supra* note 18, at 424.e15.

<sup>70</sup> CHAPPELL & CZECH, *supra* note 14, at 15. Groomers fall into three categories: romantic groomers who create a bond with the child through romantic fantasies, aggressive groomers who are impatient with the child and push them into meeting sooner than the child feels comfortable, and monetary or status groomers who prey on a child's need for independence from their parents. *Id.*

<sup>71</sup> Wolak et al., *supra* note 18, at 424.e15. The majority of contacts include telephone conversations between the sexual predator and youth. Additionally the sexual predator sends pictures and gifts to the child through the mail. *Id.*

<sup>72</sup> *Id.* (finding 21% of sexual offenders hide their true sexual motives from the youth online).

<sup>73</sup> See <http://www.perverted-justice.com> for samples of Internet luring conversations. See sources cited *supra* note 2; see also Wolak et al., *supra* note 18, at 424.e15–17.

<sup>74</sup> FINKELHOR ET AL., *supra* note 12, at 3. Cyber sex is "a form of fantasy sex, which involves interactive chat-room sessions where the participants describe sexual acts and sometimes disrobe and masturbate." *Id.*

<sup>75</sup> Wolak et al., *supra* note 18, at 424.e15–17 (finding 20% of sexual offenders engaged in cyber sex with the youth and about 18% sent sexual pictures to the minor).

<sup>76</sup> *Id.* Three quarters of the online relationships between a sexual predator and a minor involved a face-to-face meeting. *Id.* Of those meetings, the majority resulted in sexual contact between the minor and offender. *Id.*

<sup>77</sup> *Id.* (noting that half of offenders and victims who met in person lived within fifty miles of each other).

minor whom they plan to sexually abuse.<sup>78</sup> A number of these meetings take place in locations that are not in public, creating an even more dangerous situation for the child.<sup>79</sup> To escalate matters, a majority of the victims who meet with a sexual predator face-to-face also willingly accompany the perpetrator to another location.<sup>80</sup> In addition, just under half of the victims who meet the sexual predator spend the night with them.<sup>81</sup>

### III. PROTECTING YOUTH WITH INTERNET REGULATIONS: THE SUPREME COURT'S RESPONSE TO CONGRESSIONAL ACTS

The Supreme Court has not yet heard a case specifically challenging Internet luring regulations; however, legal challenges to congressional actions regulating the Internet may give insight into how the Supreme Court would view the constitutionality of such laws.<sup>82</sup> The Supreme Court in *New York v. Ferber* found the government has a compelling interest in protecting youth.<sup>83</sup> Consequently, Congress relied on this holding to enact various statutes that protect youth from harmful material on the Internet. These statutes restricted the nature of information placed on the Internet and made available to youth.<sup>84</sup> Statutes of this nature are important because often this information is used to groom minors for sexual abuse.<sup>85</sup> Yet the majority of the statutes passed by Congress failed to survive a First Amendment challenge.<sup>86</sup> To pass this chal-

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<sup>78</sup> *Id.* (finding 40% of first meetings between a minor and an offender involve offenders from different locations than the minor).

<sup>79</sup> *Id.* (stating that less than half of initial face-to-face meetings take place in public areas).

<sup>80</sup> *Id.* (“[T]he great majority of victims who met offenders face-to-face (83%) willingly went somewhere with them, often riding in offenders’ cars to the offenders’ home or to a hotel, mall, movie, or restaurant.”).

<sup>81</sup> *Id.* (“[F]orty-one percent of victims spent at least one night with the offender.”).

<sup>82</sup> See *Ashcroft v. ACLU (COPA I)*, 535 U.S. 564, 585 (2002); *Ashcroft v. ACLU (COPA II)*, 542 U.S. 656, 670 (2004). See generally *Reno v. ACLU (CDA III)*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>83</sup> *New York v. Ferber*, 458 U.S. 747, 757–58 (1982) (finding the psychological and physical protection of a minor is a compelling interest to be protected by the legislature); see also Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000) (examining the governmental interest in protecting children from questionable speech).

<sup>84</sup> E.g., Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 223 (2000)); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 2251 (2000)); Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (2000)). To publish information on the web is simple; a web publisher only needs an Internet connection, computer, and the correct software. *ACLU v. Reno (CDA I)*, 929 F. Supp. 824, 837 (E.D. Penn. 1996), *aff’d*, 521 U.S. 844 (1997).

<sup>85</sup> Wolak et al., *supra* note 18, at 424.e15.

<sup>86</sup> See *infra* discussion Parts III–III.C.

lenge, the statute must protect a compelling interest and be the least restrictive means to reach that interest.<sup>87</sup> Though protecting youth is a compelling interest, Congress has failed to find a way to protect youth on the Internet that is narrowly tailored to not restrict an adult's access to constitutionally protected speech.

#### A. Communications Decency Act

In 1996, Congress passed the Communications Decency Act ("CDA") which regulated obscene and indecent speech on the Internet.<sup>88</sup> Parts of the CDA were challenged by the American Civil Liberties Union ("ACLU") on grounds that it violated the First Amendment.<sup>89</sup> Specifically, the ACLU challenged the sections of the CDA that criminalized giving obscene or indecent material to a minor<sup>90</sup> and knowingly sending or displaying patently offensive messages in a manner available to a person under the age of eighteen.<sup>91</sup>

The Supreme Court upheld the preliminary injunction issued by the district court, finding that the CDA would not pass constitutional scrutiny.<sup>92</sup> The Court found the statute overbroad and vague because, while it protected minors, it also limited adults' rights to access speech that is protected by the First

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<sup>87</sup> *CDA I*, 929 F. Supp. at 827; see also Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 577 (2005) (discussing who should determine the constitutionality of censorship for children and whether child-protection censorship should be exempt from First Amendment protection).

<sup>88</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 223 (2000)).

<sup>89</sup> *CDA I*, 929 F. Supp. at 826-27 (challenging § 223(a) and § 223(d) of the Communications Decency Act on First Amendment and due process grounds).

<sup>90</sup> *Reno v. ACLU (CDA III)*, 521 U.S. 844, 859 (1997).

<sup>91</sup> *Id.* Section 223(d) provides:

(d) Sending or displaying offensive material to persons under 18  
Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(d) (2000).

<sup>92</sup> *CDA III*, 521 U.S. at 864.

Amendment.<sup>93</sup> The Supreme Court stated that the definition of “indecent materials” does not give Internet users a clear idea of what qualifies as restricted material.<sup>94</sup> In addition to regulating obscene material, the Court found the challenged sections of the CDA to include material that is constitutionally protected.<sup>95</sup> The vagueness of the statute, the Court believed, would cause uncertainty among Internet “speakers” and would silence constitutionally protected speech.<sup>96</sup> The CDA failed because it did not give Internet users clear guidelines to allow them to tailor their Internet use to comply with the CDA and still be able to express all constitutionally protected speech.

## B. Child Pornography Prevention Act

The Child Pornography Prevention Act of 1996 (“CPPA”) sought to prohibit child pornography created using virtual images depicting youth.<sup>97</sup> The Free Speech Coalition challenged the CPPA, claiming that it violated the First Amendment.<sup>98</sup> In *New York v. Ferber*, the Supreme Court held that prohibiting child pornography is dependent on the protection of youth<sup>99</sup> but overturned the CPPA because it would criminalize pornography that is not harmful to anyone.<sup>100</sup> Congress drafted the CPPA based on findings that although no youth were involved in the creation of the virtual pornography, the consequences could still indirectly affect youth.<sup>101</sup> The Court rejected this reasoning, stating, “[T]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”<sup>102</sup> Using vir-

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<sup>93</sup> *Id.* at 865–66.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 874 (finding the CDA would suppress speech that adults have a constitutional right to access).

<sup>96</sup> *Id.* at 871 (noting the absence of definitions for “indecent” and “patently offensive” provokes uncertainty among Internet speakers).

<sup>97</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 2251 (2000)); *see also* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002) (noting the range of illegal images are often called “virtual child pornography” and contain not only computer generated pictures of children but images produced in a traditional manner).

<sup>98</sup> *Free Speech Coalition*, 535 U.S. at 240 (“The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.”)

<sup>99</sup> *New York v. Ferber*, 458 U.S. 747, 757–58.

<sup>100</sup> *Free Speech Coalition*, 535 U.S. at 249.

<sup>101</sup> *Id.* at 241. Congress argued that the materials may be used to encourage participation in sexual activity or “pedophiles might ‘whet their own sexual appetites’ with the pornographic images, ‘thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children.’” *Id.* Additionally there was a concern that these images could be used to groom children. *Id.*

<sup>102</sup> *Id.* at 253 (quoting *Hess v. Indiana*, 414 U.S. 105 (1973)).

tual images of youth in pornography creates no victims and therefore it is not a crime.<sup>103</sup> Here, Congress failed because the government has no compelling interest to restrict this form of speech.<sup>104</sup>

### C. Child Online Protection Act

Congress' most recent legislative attempt at protecting youth from harmful material on the Internet was the passage of the Child Online Protection Act ("COPA").<sup>105</sup> By enacting the COPA, Congress tried to overcome the vagueness problems found in the CDA, but did not take into consideration less restrictive means of protecting children accessing the Internet.<sup>106</sup> The COPA included definitions for the terms "harmful material"<sup>107</sup> and "minors"<sup>108</sup> in an attempt to eliminate all vagueness from the statute. Additionally, the COPA provided affirmative defenses in an attempt to narrowly tailor the statute.<sup>109</sup> The definition of "material harmful to minors" incorporated the Supreme Court's test for obscenity, as stated in *Miller v. California*.<sup>110</sup> The *Miller* test uses "con-

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<sup>103</sup> *Id.* at 254.

<sup>104</sup> *Id.* at 250 (finding virtual child pornography does not harm children and therefore is afforded First Amendment protection).

<sup>105</sup> Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (2000)).

<sup>106</sup> See discussion *supra* Part III.A.

<sup>107</sup> 47 U.S.C. § 231(c)(1). Material "harmful to minors" is defined as: any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interests;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minor, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole lacks serious literary, artistic, political, or scientific value for minor.

47 U.S.C. § 231(a)(6).

<sup>108</sup> Minors are defined as any person under seventeen years of age. *Id.* § 231(e)(7).

<sup>109</sup> The affirmative defenses under COPA require a showing that the individual has restricted access by minors to material that is harmful to minors:

"(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age, or

(C) by any other reasonable measures that are feasible under available technology."

*Id.* § 231(c)(1).

<sup>110</sup> *Miller v. California*, 413 U.S. 15, 24 (1973). The test announced by the Supreme Court to determine whether communications are obscene is:

(a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically de-

temporary community standards” to determine if the material is obscene; however, due to the decentralized nature of the Internet, this part of the test became problematic.<sup>111</sup>

The ACLU challenged the COPA in 2000 and the U.S. Court of Appeals for the Third Circuit affirmed a preliminary injunction issued by the district court on grounds that the statute was overbroad due to the contemporary community standards language.<sup>112</sup> The court found that community standards are different throughout the United States and since an Internet user cannot control the communities in which his or her website is viewed, all content would be limited to the most conservative community standards.<sup>113</sup>

The Supreme Court then reviewed the COPA and found that the community standards language alone could not cause the COPA to fail judicial scrutiny.<sup>114</sup> The Court stated it is the publisher’s responsibility to abide by the community standards in which he places his material.<sup>115</sup> The Court remanded the case back to the Third Circuit to review the constitutionality of the other aspects of the

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fined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.*

<sup>111</sup> *ACLU v. Reno (CDA I)*, 929 F. Supp. 824, 830–32 (E.D. Penn. 1996), *aff’d*, 521 U.S. 844 (1997). When the Internet was created in 1969, to assist military operations and university research, it was designed to be self-maintaining and decentralized. *Id.* The Internet is a network which is created by linking a number of smaller networks together throughout the world without one central passing point for all Internet communication. *Id.* This configuration makes it impossible to determine how vast the Internet is at any given time and is an example of how overwhelmingly large the Internet has become. *Id.* A piece of information is broken up into “packets” and these packets travel through many different computers before coming back together at one computer. *Id.* The organizational structure of the Internet is such that communications travel through many different paths and a number of cities or countries to reach its final destination. *Id.* Because of its far reaching capabilities, the Internet is difficult to regulate and its decentralized nature creates many jurisdictional issues. *Id.*; see also Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 *FED. COMM. L.J.* 117 (1997–1998) (identifying how different countries may create rules for the Internet and approaches to enforcement of these rules and jurisdictional issues); Shamoil Shipchandler, *The Wild Wild Web: Non Regulation As the Answer to the Regulation Question*, 33 *CORNELL INT’L L.J.* 435 (2000) (examining different approaches to Internet regulation in the United States, Germany, and China and determining that eventually the Internet will find its own way to self-regulate because government regulation will never work).

<sup>112</sup> *ACLU v. Reno (CDA II)*, 217 F.3d 162, 166 (3d Cir. 2000), *aff’d*, 542 U.S. 656 (2004); see also William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 *CATH. U. L. REV.* 245 (2001) (exploring the constitutionality of COPA and looking at other alternatives for Congress and parents to protect children on the Internet).

<sup>113</sup> See *CDA II*, 217 F.3d at 174.

<sup>114</sup> *Ashcroft v. ACLU (COPA I)*, 535 U.S. 564, 585 (2002).

<sup>115</sup> *Id.* at 583.



legislation under the First Amendment.<sup>116</sup>

The second review by the Third Circuit found that the COPA did not use the least restrictive means to protect children from harmful material and consequently violated the First Amendment.<sup>117</sup> The Supreme Court upheld the decision, finding filtering software may be a less restrictive means and more effective protection than the COPA in protecting children on the Internet.<sup>118</sup> Nevertheless, the Court again remanded the case back to the district court to consider additional factual issues.<sup>119</sup> The Court noted that not only could case precedent change during the years the case was held up in litigation but due to technological advances there may be other less restrictive means available to protect children on the Internet.<sup>120</sup>

#### D. Children's Internet Protection Act

Despite the failures of the CDA, the COPA, and the CPPA, in 2000 Congress passed one statute protecting minors from harmful material on the Inter-

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<sup>116</sup> *Id.* at 602.

<sup>117</sup> *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004).

<sup>118</sup> *Ashcroft v. ACLU (COPA II)*, 542 U.S. 656, 670 (2004); *see also* Sue Ann Mota, *Protecting Minors from Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court*, 7 TUL. J. TECH. & INTELL. PROP. 95 (2005) (examining Congress' attempts to regulate the Internet to protect minors and the Court's responses to these attempts).

<sup>119</sup> *COPA II*, 542 U.S. at 671–73.

<sup>120</sup> *Id.* When Congress enacted the Child Online Protection Act it also created the Commission on Online Child Protection ("Commission") to examine the available methods to protect minors from harmful materials. COMMISSION ON CHILD ONLINE PROTECTION (COPA), REPORT TO CONGRESS 11–12 (2000), *available at* <http://www.copacommission.org/report/COPAreport.pdf>. The Commission looked at filtering and blocking services, labeling and rating systems, age verification systems, a domain for harmful material, Internet monitors, family contract, domain spaces containing only child friendly material, and options for increased prosecution. *Id.* at 18–38. The conclusion made by the Commission requires a combination of consumer empowerment, publication education, industry action, and increased enforcement of existing laws to protect children from harmful materials on the Internet. *Id.* at 39–43. The Commission encourages an education campaign to create public awareness of the availability of access to harmful materials on the Internet and the importance of parental involvement in a child's online activity. *Id.* at 9. Additionally, the Commission found that there is not enough information given to the public about how well current technology is able to protect children and therefore recommended the private sector support a testing facility for these technologies and provide the public with its findings. *Id.* at 18. Finally, the Commission recommended that the Internet industry as a whole should adopt "best practices" standards to protect children from harmful material online. *Id.* at 44–45.

In preparation for the third round of litigation surrounding the COPA, the Department of Justice is initiating a study designed to test the effectiveness of filtering software and subpoenaed URL and search queries from Yahoo!, Inc., America Online, Inc., Microsoft, Inc., and Google, Inc. *Gonzales v. Google, Inc.*, No. CV. 06-8006MISC JW, slip op. at 3 (N.D. Cal. filed Mar. 17, 2006).

net that survived judicial scrutiny—the Children’s Internet Protection Act (“CIPA”).<sup>121</sup> CIPA made government funding available to support Internet access at public libraries that installed filtering software, used to block obscene and inappropriate material.<sup>122</sup> Filters search websites for key words and restrict access to sites that the computer operator has blocked.<sup>123</sup> Congress noted that filters may block some constitutionally protected speech that is appropriate for adults and added a provision that allows for the disabling of the filters when a patron needs to access blocked information for “bona fide research or other lawful purposes.”<sup>124</sup>

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<sup>121</sup> Children’s Internet Protection Act, Pub. L. No. 106–554, 114 Stat. 2763, 2763A–340 (2000) (codified at 20 U.S.C. § 9134(f) (2000)).

<sup>122</sup> The Children’s Internet Protection Act provides in pertinent part:

(f) Internet Safety

(1) In general

No funds made available under this subchapter for a library described in section 9122(1)(A) or (B) of this title that does not receive services at discount rates under section 254(h)(6) of title 47 may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet, for any such library unless—

(A) such library—

(i) has in place a policy of Internet safety for minors that includes that operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors; . . .

20 U.S.C. § 9134(f).

<sup>123</sup> *ACLU v. Reno (CDA I)*, 929 F. Supp. 824, 840 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997). Filtering software places websites in various categories such as pornography or violence and gives parents the ability to block access to those categories of information they deem harmful to their children. For example, Cybersitter blocks access to websites which contain violence, sex, drugs, and hate speech. Additionally, parents are able to choose from thirty-two different categories of information to tailor the filter to their child’s needs. *Cybersitter* 9.0, PC MAGAZINE, Aug. 3, 2004, <http://www.pcmag.com/article2/0,1759,1618830,00.asp>. See also “CyberPatrol,” a computer program which allows parents to block the following categories of information: weapons, violence, sex education, remote proxies (the ability of many computers to go through one connection that would not have a filter or may allow access to places on the Internet the computer would not otherwise be able to connect), anonymous surfing, web-based translation sites that circumvent filtering, peer-to-peer sharing, multiple category servers (IP addresses where different sites under several categories are hosted), hate speech, hacking and spyware (software used to illegally gain access to other computers), sites that carry malicious executables or viruses, sites that provide instruction or work-arounds for filtering software, pirated software and multimedia download sites, and computer crime, glamour and intimate apparel, gambling, drugs, alcohol and tobacco, criminal activity and phishing (a scam to steal personal information from other people on the Internet), chat rooms, and adult material. For the criteria used in each category, see CyberLIST, <http://cyberpatrol.com> (last visited Mar. 12, 2006).

<sup>124</sup> 20 U.S.C. § 9134(f)(3).

The American Library Association, Inc. challenged the CIPA on First Amendment grounds.<sup>125</sup> The case focused on the over-inclusive nature of filters that block constitutionally protected speech.<sup>126</sup> The Supreme Court noted that libraries may set the filters to allow information from websites that contain material on history, education, or medicine and may allow access to specific websites that would otherwise be blocked.<sup>127</sup> The Court found the restrictions in the CIPA are constitutional because they give library personnel the ability to choose what information will be restricted and have the authority to disable the filter when necessary. This allows adults access to all constitutionally protected speech on the Internet while still protecting minors by limiting their access to harmful material.<sup>128</sup> Filters placed on library computers will block any websites which contain indecent or obscene material, allowing minors the freedom to use the Internet without encountering harmful material.<sup>129</sup>

The dissenting opinions focused on the effectiveness of filters, the alternate means available to libraries to prevent access to obscene material, and the disabling provision.<sup>130</sup> Justice Stevens, writing for the dissenters, argued that due to the nature of the Internet, filters will not block all harmful material, allowing some access to obscene material on library computers. The filters could also block information that is appropriate for both adults and minors to view.<sup>131</sup> Justice Stevens maintained these problems make the filters overly broad, thus rendering the CIPA unconstitutional.<sup>132</sup>

In addition, the dissenting opinion argued that the district court was able to find less restrictive means to protect minors from harmful material accessed through library computers. For example, libraries can create Internet use policies prohibiting access to harmful speech and provide punishments for violations of these policies.<sup>133</sup> Finally, Justice Stevens' dissent noted that the disabling provision does not require libraries to disable the filters at the request of an adult, but instead only states that libraries "may" disable filters.<sup>134</sup> The addi-

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<sup>125</sup> *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 202–03 (2003).

<sup>126</sup> *Id.* at 202.

<sup>127</sup> *Id.* The Supreme Court's discussion on Internet filters is important to consider in light of the suggestions made in *COPA II*, 542 U.S. 656, 673 (2004) that filters may be a less restrictive means for Congress to regulate the Internet. If a third round of litigation over the COPA finds that Congress still has not used the least restrictive means to protect children on the Internet, Congress may attempt to enact a statute using filters similar to those in the CIPA.

<sup>128</sup> *Am. Library Ass'n, Inc.*, 539 U.S. at 208.

<sup>129</sup> *See id.*

<sup>130</sup> *See id.* at 220–31 (Stevens, J., dissenting); *id.* at 231–242 (Souter, J., & Ginsburg, J., dissenting).

<sup>131</sup> *Id.* at 222 (Stevens, J., dissenting).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 223.

<sup>134</sup> *Id.*

tional burden placed on adults to ask library personnel to disable a filter would keep adults from accessing information that they would otherwise be able to access.<sup>135</sup>

Through the First Amendment challenges to federal statutes, the Supreme Court has provided a framework to guide Congress in constructing Internet regulations created to protect minors.<sup>136</sup> For legislation to pass First Amendment review it must be the least restrictive means necessary to shield minors from harmful material on the Internet.<sup>137</sup> The rapid growth and changing nature of the Internet makes this a difficult task because new technology is constantly being created to provide protection to minors on the Internet.<sup>138</sup> By focusing on using filtering software to restrict access to harmful websites, Congress may be able to pass more rigorous legislation to protect minors from inappropriate content located on the Internet.<sup>139</sup>

#### IV. STATE ACTIONS PROTECTING CHILDREN ON THE INTERNET

State governments have also taken actions to protect youth from harmful material and individuals on the Internet. By enacting laws similar to federal legislation that regulate the content of the materials youth are able to access, states are also trying to find a way to keep our youth safe online.<sup>140</sup> States have criminalized the use of the Internet to lure a child into a situation where he or

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<sup>135</sup> *Id.* at 224–25.

<sup>136</sup> See discussion *supra* Part III.

<sup>137</sup> See generally *Reno v. ACLU (CDA III)*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Ashcroft v. ACLU (COPA I)*, 535 U.S. 564 (2002); *Ashcroft v. ACLU (COPA II)*, 542 U.S. 656 (2004).

<sup>138</sup> *ACLU v. Reno (CDA I)*, 929 F. Supp. 824, 830–32 (E.D. Penn. 1996), *aff'd*, 521 U.S. 844 (1997); *COPA II*, 542 U.S. at 671.

<sup>139</sup> The Truth in Domain Names Act is one example of legislation which has been passed with the goal of protecting children from harmful material on the Internet. See *supra* note 16 and accompanying text. Additionally, in 2002, Congress passed the Dot Kids Implementation and Efficiency Act of 2002 to create a secondary domain under the “.us” domain name. Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317 § 2, 116 Stat. 2767 (codified at 47 U.S.C. § 941 (Supp. I 2003)). Congress found that due to the amount of material that potentially can be harmful to minors on the Internet, there needs to be a place created that is child friendly. *Id.* § 941(a). Websites that are appropriate for children under the age of thirteen may request a “.kid.us” (“Dot Kids”) domain name through NeuStar, Inc. NEUSTAR, INC., KIDS.US CONTENT POLICY: GUIDELINES AND RESTRICTIONS 2–4 (2003), [http://www.kids.us/content\\_policy/content\\_policy.pdf](http://www.kids.us/content_policy/content_policy.pdf). The guidelines for websites given a “Dot Kids” domain name must comply with existing laws regarding indecency on the airwaves, offer some educational and informational content, and comply with the Children’s Online Privacy Protection Act. *Id.* at 6–7. Additionally, the websites are not permitted to contain a number of categories of information ranging from inappropriate language to pornography. *Id.* at 8–10.

<sup>140</sup> KLAIN ET AL., *supra* note 20, at 26–34.

she may be sexually abused.<sup>141</sup> In addition to the First Amendment problems experienced by Congress in its attempt to regulate the Internet, states have another hurdle to overcome: the dormant Commerce Clause.<sup>142</sup>

## A. Challenges to State Regulations of Obscene and Indecent Speech

### 1. First Amendment Challenges to Regulations of Obscene and Indecent Speech

Many attempts made by state governments to regulate obscene and indecent speech on the Internet have been similar to the CDA and the COPA.<sup>143</sup> Like the federal government, states have a compelling government interest in protecting minors.<sup>144</sup> Yet, similarly, states have not found a way to narrowly tailor Internet legislation that does not eliminate adult-protected speech.<sup>145</sup>

The state Internet regulations, like their federal counterparts, have failed to use the least restrictive means available to protect minors from harmful material without placing an undue burden on adult Internet users. For example, the Second Circuit found filtering software or Internet luring statutes as a less restrictive means to protect minors when compared to eliminating the material altogether.<sup>146</sup> Another option that has been considered as a least restrictive

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<sup>141</sup> *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), *cert. denied*, 532 U.S. 1009 (2001) (finding 18 U.S.C. § 2422(b) (2000) does not violate the First Amendment); *see* statutes cited *supra* note 25. *Cf.* 18 U.S.C. § 2422(b) (criminalizing the enticement of minors at the federal level).

<sup>142</sup> U.S. CONST. art. I, § 8, cl. 3. *See generally* *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (reviewing the history of the Commerce Clause and discussing why the framers centralized the regulation of interstate commerce in Congress).

<sup>143</sup> *See* KLAIN ET AL., *supra* note 20, at 27–34.

<sup>144</sup> *PSINET Inc. v. Chapman*, 167 F. Supp. 2d 878, 884 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004); *see also* *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (acknowledging states are constitutionally permitted to restrict minor's access to material that may not be considered obscene for adults but would be harmful to minors); Richard J. Zecchino, *Could the Framers Ever Have Imagined? A Discussion on the First Amendment and the Internet*, 1999 L. REV. M.S.U.-D.C.L. 981 (analyzing the First Amendment problems faced by federal and state governments in protecting children on the Internet).

<sup>145</sup> *Am. Booksellers Found.*, 342 F.3d at 101.

<sup>146</sup> *Id.* at 99–101. The challenged statute, An Act Relating to Internet Crimes, provides: Disseminating indecent material to a minor outside the presence of the minor

(a) No person may, with knowledge of its character and content, and with actual knowledge that the recipient is a minor, sell, lend, distribute or give away:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image, including any such representation or image which is communicated, transmitted, or stored electronically, of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

means is parents' ability to regulate their children's Internet use and turn off the computer when they find their children accessing harmful material.<sup>147</sup> In making this determination, the District Court for the Eastern District of Michigan stated that parents should take an active role in youth's Internet use in place of state legislation.<sup>148</sup> Despite their efforts, state legislatures have not been able to develop a method to regulate the Internet that would be considered the least restrictive means by the courts.

In addition to failing the narrowly tailored prong on a least restrictive means basis, some state courts have found Internet regulations place an undue burden on adults' ability to access constitutionally protected material on the Internet.<sup>149</sup> If states want to protect minors from inappropriate material on the Internet, it must be done in a way that does not limit or burden what adults may access.<sup>150</sup> In recognizing the current state of Internet technology, the District Court for the Western District of Virginia found that Internet regulations that keep minors from harmful material will create an undue burden on adult Internet users since there is no way for websites to limit their viewer-ship.<sup>151</sup>

States have encountered the same First Amendment barriers as Congress when trying to enact legislation to protect youth from harmful materials on the Internet.<sup>152</sup> The nature of the Internet seems to make it impossible to pass legislation that would protect youth from harmful materials on the Internet without restricting adults' access to constitutionally protected material.

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(2) any book pamphlet, magazine, printed matter, however reproduced or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

VT. STAT. ANN. tit. 13, § 2802a (LEXIS through 2005 Sess.). The Vermont statute defines material that is "harmful to minors" as material that:

Predominantly appeals to the prurient, shameful or morbid interest of minors; and is patently offensive to prevailing standards in the adult community in the state of Vermont as a whole with respect to what is suitable material for minors; and taken as a whole, lacks serious literary, artistic, political, or scientific value, for minors.

*Id.* § 2801(6) (LEXIS through 2005 Sess.).

<sup>147</sup> *Cyberspace, Commc'n, Inc., v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000).

<sup>148</sup> *Id.* at 750.

<sup>149</sup> *Am. Booksellers Found.*, 342 F.3d at 101.

<sup>150</sup> *See id.*; *see also PSINET Inc. v. Chapman*, 167 F. Supp. 2d 878, 881 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004).

<sup>151</sup> *See PSINET Inc.*, 167 F. Supp. 2d at 880; *see also Reno v. ACLU (CDA III)*, 521 U.S. 844, 871-74 (1997).

<sup>152</sup> *E.g., Am. Booksellers Found.*, 342 F.3d 96; *PSINET Inc.*, 167 F. Supp. 2d 878; *Cyberspace*, 55 F. Supp. 2d 737.

## 2. Dormant Commerce Clause Challenges to Regulations of Obscene and Indecent Speech

In addition to First Amendment challenges to statutes enacted to protect youth from harmful material on the Internet, states face an extra challenge—the dormant Commerce Clause. The U.S. Constitution gives Congress the power to regulate interstate commerce but it is silent as to the role of the states in regulating items that affect interstate commerce.<sup>153</sup> This constitutional silence is interpreted as giving Congress the sole power to regulate interstate commerce.<sup>154</sup> The Supreme Court has interpreted the Commerce Clause as restricting states from regulating anything that may affect or burden interstate commerce in what is known as the *Pike* balancing test.<sup>155</sup> The test requires (1) a state to show that it has a legitimate local public interest which the legislation is protecting and (2) the effects must not place an excessive burden on interstate commerce.<sup>156</sup>

Under the first part of the *Pike* balancing test,<sup>157</sup> states have a legitimate interest in the safety of their residents, especially youth.<sup>158</sup> In addition, the Supreme Court validated this interest in *Ferber* when it recognized the government had a compelling interest to protect minors who are the victims of a crime.<sup>159</sup> There is no question states' child-based Internet laws satisfy the first prong of the *Pike* balancing test.

The second part of the *Pike* balancing test requires courts to look at the extent of the burden placed on interstate commerce.<sup>160</sup> The Second Circuit recognized that a statute will burden interstate commerce when it:

- (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of

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<sup>153</sup> U.S. CONST. art. I, § 8, cl. 3; see *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

<sup>154</sup> See *H.P. Hood & Sons, Inc.*, 336 U.S. at 663.

<sup>155</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>156</sup> The Court determined:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.*

<sup>157</sup> *Id.* at 141.

<sup>158</sup> See Ross, *supra* note 83, at 472–508 (discussing the state governmental interests of empowering parents and protecting children from controversial speech).

<sup>159</sup> *New York v. Ferber*, 458 U.S. 747, 757–58 (1982).

<sup>160</sup> *Pike*, 397 U.S. at 141.

the goods in question, as distinct from the impact on companies trading in those goods.<sup>161</sup>

If none of these elements are fulfilled, the statute does not substantially affect interstate commerce as to invoke the dormant Commerce Clause.<sup>162</sup>

The Internet is not only a place for expressing ideas and communication but is also often used in interstate commerce; therefore the dormant Commerce Clause is invoked.<sup>163</sup> The federal courts disagree on how to determine whether Internet luring statutes can be considered to affect commerce in a way that would invoke the dormant Commerce Clause.<sup>164</sup>

There are two views on whether the Internet affects commerce. In *American Library Ass'n, Inc. v. Pataki*, the Southern District of New York determined it is impossible to regulate the Internet in any manner without violating the dormant Commerce Clause.<sup>165</sup> In *Pataki*, the court noted that even if one only uses the Internet for private communication purposes, he or she still participates in interstate commerce "by virtue of their Internet consumption."<sup>166</sup> Under this view, any conduct or communication via the Internet is considered to affect commerce and the *Pike* balancing test must be applied.

On the other hand, the court in *People v. Foley* noted that Internet statutes regulating conduct do not burden interstate commerce.<sup>167</sup> In finding a middle ground between the two New York cases, the California Court of Appeals found that the Internet is part of interstate commerce but statutes which regulate communications on the Internet do not always burden interstate commerce and must be considered individually.<sup>168</sup>

In addition to looking at the *Pike* balancing test, the other important aspect of the dormant Commerce Clause is to allow states to retain their autonomy.<sup>169</sup> The global nature of the Internet eliminates all physical and geographical boundaries. Therefore, it is difficult for a state to limit the application of its

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<sup>161</sup> *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003).

<sup>162</sup> *See id.*

<sup>163</sup> *See Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 172–73 (S.D.N.Y. 1997) (finding that the Internet does more than facilitate communication but is also a vehicle for commerce).

<sup>164</sup> *Id. But see People v. Foley*, 731 N.E.2d 123 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000).

<sup>165</sup> *Am. Libraries Ass'n, Inc.*, 969 F. Supp. at 173.

<sup>166</sup> *Id.*

<sup>167</sup> *People v. Foley*, 731 N.E.2d 123, 132–33 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000) (finding the New York Internet luring statute does not burden interstate commerce because it prohibits individuals from using the Internet to endanger children); *see also* John Caher, *State Internet Porn Law Upheld Luring Children into Sex Is Not Protected Speech*, 223 N.Y. L.J. 1 (2000) (containing background information on the actions and arrest of Thomas R. Foley Sr.).

<sup>168</sup> *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (Cal. Ct. App. 2000).

<sup>169</sup> *See generally* *Edgar v. MITE Corp.*, 457 U.S. 627 (1982) (finding state autonomy to be important and an Illinois anti-takeover statute directly restrains interstate commerce because it affects both individuals within and outside of the state).



statutes only to its own citizens or to those who choose to participate in commerce or activities within the state.<sup>170</sup> The *Pataki* decision noted that Internet users “neither know nor care about the physical location of the Internet resources they access”<sup>171</sup> and the Internet does not have boundaries restricting users from different states.<sup>172</sup> Therefore, an Internet user who wishes to produce a website would be required to comply with the most conservative state legislation to avoid prosecution.<sup>173</sup> A website operator cannot control the states in which his website is viewed and therefore may not restrict access in states with Internet regulations that the operator does not want to subject himself to.<sup>174</sup>

The *Pataki* court also noted that “the unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach.”<sup>175</sup> In *Pataki*, the court found the Internet to be one of the aspects of commerce that demands consistent treatment from the national government.<sup>176</sup> The courts that determined Internet luring statutes do not affect commerce did not consider the impact of a user adhering to multiple state laws.

Additionally, in *PSINET v. Chapman*, a federal district court in West Virginia noted that statutes regulating content on the Internet would be legal if the regulations were limited to the physical world. However, the nature of the Internet is fatal to these statutes.<sup>177</sup> Within the real world, individuals make a conscious choice to abide by statutes of different states by choosing to have contact with the state. The Internet does not give individuals a choice as to which states they come in contact with and therefore website operators are subjected to the statutes of any state in which an individual accesses the website.

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<sup>170</sup> *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103–04 (2d Cir. 2003) (finding that it is difficult for states to regulate Internet activity without also affecting other states).

<sup>171</sup> *Am. Libraries Ass’n, Inc.*, 969 F. Supp. at 170.

<sup>172</sup> *Id.* at 171.

<sup>173</sup> *PSINET Inc. v. Chapman*, 167 F. Supp. 2d 878, 891 (W.D. Va. 2001), *aff’d*, 362 F.3d 227 (4th Cir. 2004) (finding that information placed on the Internet can be accessed by an individual in any state and therefore, users would be required to comply with the most restrictive state law to avoid possible prosecution when placing information on the Internet).

<sup>174</sup> *See id.*

<sup>175</sup> *Pataki*, 969 F. Supp. at 168.

<sup>176</sup> *Id.* at 181 (finding that the only Internet regulation that may be effective will require at least national, if not global, cooperation); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104–05 (2d Cir. 2005) (noting that the Vermont statute is overbroad and will be forced onto the rest of the nation); *PSINET Inc.*, 167 F. Supp. 2d at 891 (finding regulations of Internet pornography pose a great burden on out-of-state businesses).

<sup>177</sup> *PSINET Inc.*, 167 F. Supp. 2d at 891 (recognizing that states are able to regulate real-space pornography through their obscenity laws while remaining within the boundaries placed by the Commerce Clause). Applying these laws to the Internet is very different because pornographers are unable to select which state laws they are willing to comply with. *Id.*

Courts that have discussed the dormant Commerce Clause in relation to Internet regulation have concluded that because of the decentralized nature of the Internet, states will not be able to overcome the restrictions created by the dormant Commerce Clause.<sup>178</sup> These courts have also found that the Internet is part of a category of things that are protected from regulation by the states because they require a single uniform regulation.<sup>179</sup>

## B. Challenges to State Internet Luring Statutes

Internet luring statutes criminalize the solicitation, inciting, or luring of minors for sexual purposes.<sup>180</sup> Most of these statutes require the minor and sexual

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<sup>178</sup> See *supra* note 170 and accompanying text.

<sup>179</sup> *Am. Booksellers Found.*, 342 F.3d at 104; *Pataki*, 969 F. Supp. at 169, 182–83. The need for a uniform regulation may extend further than a national regulation into a uniform international regulation may effectively protect children from harmful Internet material. *Id.* Creating international rules gives rise to many issues since each nation has its own view as to what speech the government should protect and what speech may be regulated by the government. *Id.* at 181; see also *Am. Booksellers Found.*, 342 F.3d at 102; *Wilske & Schiller*, *supra* note 111 (identifying the approach different countries take to create regulations for the Internet and the issues that will arise in enforcing these regulations in different jurisdictions); *Shipchandler*, *supra* note 111.

<sup>180</sup> New York's statute provides:

A person is guilty of disseminating indecent material to minors in the first degree when:

- (1) [K]nowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally use any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
- (2) [B]y means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.

N.Y. PENAL LAW § 235.22 (McKinney 2000); see also *People v. Foley*, 731 N.E.2d 123, 132–33 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000) (finding the New York Internet statute survives a First Amendment challenge). Alternatively, North Dakota's statute states:

An adult is guilty of luring minors by computer when:

1. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system that allows input, output, examination or transfer of computer data or computer programs from one computer to another to initiate or engage in such communication with a person the adult believes to be a minor; and
2. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.

N.D. CENT. CODE § 12.1-20-5.1 (2005); *People v. Backlund*, 672 N.W.2d 431, 434 (N.D.

predator to meet and a crime to be committed.<sup>181</sup> Sexual predators are frequently arrested at the location where they planned to meet the minor and do not have the opportunity to harm a child.<sup>182</sup> In challenges to state Internet luring statutes, courts must again look at both First Amendment and dormant Commerce Clause issues.

### 1. First Amendment Challenges to State Internet Luring Statutes

The state statutes discussed above that regulate speech on the Internet do not survive a First Amendment challenge because of a failure to provide a least restrictive means.<sup>183</sup> Alternatively, Internet luring statutes have passed First Amendment challenges because they include a second element that restricts conduct in addition to speech.<sup>184</sup>

The conduct element included in all Internet luring statutes distinguishes these statutes from other regulations because their focus is shifted from speech to conduct, and therefore they pass constitutional muster under the First Amendment.<sup>185</sup> The New York Court of Appeals found that this difference distinguished the New York Internet luring statute from the Internet regulation statute in *Pataki*.<sup>186</sup> The court also distinguished the luring legislation from the failed federal Internet statutes because the luring law is not solely directed at

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2003) (upholding the North Dakota Internet luring statute against a First Amendment challenge); Finally, the California statute states:

(b) Ever person who, with knowledge that a person is a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by electronic mail, the Internet . . . or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor, is guilty of a public offense . . . .

CAL. PENAL CODE § 288.2(b) (West 2000).

<sup>181</sup> *Id.*

<sup>182</sup> See *Commonwealth v. Zingarelli*, 839 A.2d 1064, 1071 (Pa. Super. Ct. 2003), *appeal denied*, 856 A.2d 834 (Pa. 2004) (finding that renting a motel room, purchasing wine and condoms, bringing an overnight bag, and driving a considerable distance is a substantial step towards committing the crime of Internet luring to find the offender guilty of attempting to solicit a minor over the Internet). See generally *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004), *cert. denied*, 543 U.S. 960 (2004); *State v. Robins*, 646 N.W.2d 287, 288 (Wis. 2002), *cert. denied*, 537 U.S. 1007 (2002) (finding a police officer posing as a child makes the crime committed only an attempt).

<sup>183</sup> See discussion *supra* Part IV.A.1.

<sup>184</sup> See *People v. Foley*, 731 N.E.2d 123, 132 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000); see also *People v. Hsu*, 99 Cal. Rptr. 2d 184, 192 (Cal. Ct. App. 2000).

<sup>185</sup> *Hsu*, 99 Cal. Rptr. 2d at 192 (finding the appropriate test to determine whether speech is being regulated is to determine if the regulation has been adopted to discourage the message conveyed).

<sup>186</sup> *Foley*, 731 N.E.2d at 132–33.

Internet communication but regulates action on the Internet.<sup>187</sup> In addition, the Supreme Court has also noted the distinction between Internet laws that regulate speech and those that regulate conduct.<sup>188</sup>

Alternatively, the California Court of Appeals determined the conduct element of that state's Internet luring statute would be subject to a First Amendment challenge because it includes a speech element.<sup>189</sup> The court found the conduct regulated by the statute is not pure conduct but also includes speech and therefore is subject to the First Amendment.<sup>190</sup> After determining the statute regulates content-based speech, the court looked at the overbreadth and vagueness elements of the statute.<sup>191</sup> The court determined the California Internet luring statute would only affect the speech of those who solicit minors on the Internet and contained affirmative defenses to further limit its reach and therefore could not be overbroad.<sup>192</sup> Finally, the court determined the elements of the statute are sufficiently defined when looking at the penal code as a whole to give individuals notice of the types of prohibited conduct.<sup>193</sup>

## 2. Dormant Commerce Clause Challenges to State Internet Luring Statutes

The dormant Commerce Clause is the biggest obstacle states must overcome in a challenge to Internet luring statutes. The Supreme Court determined that conduct that would be harmful to youth deserves no economic protection.<sup>194</sup> When reviewing Internet luring statutes, the majority of courts have considered the regulated conduct in order to determine if luring a minor with sexual moti-

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<sup>187</sup> See *id.* at 128–29 (noting the statute describes acts of communication and does not prohibit an individual's opinion); see also *State v. Backlund*, 672 N.W.2d 431, 441 (N.D. 2003) ("The common thread in the cases involving First Amendment challenges to luring statutes is that freedom of speech does not extend to speech used as an integral part of conduct in violation of a valid criminal statute."); *State v. Snyder*, 801 N.E.2d 876, 883 (Ohio Ct. App. 2003), *appeal not allowed*, 807 N.E.2d 367 (Ohio 2004); *State v. Robins*, 646 N.W.2d 287, 291 (Wis. 2002), *cert. denied*, 537 U.S. 1007 (2002).

<sup>188</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251–54 (2002); see also *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000), *cert. denied*, 532 U.S. 1009 (2001) (finding there is no First Amendment right to persuade minors to participate in sexual acts).

<sup>189</sup> *Hsu*, 99 Cal. Rptr. 2d at 193.

<sup>190</sup> *Id.*; see also *Karwoski v. State*, 867 So. 2d 486 (Fla. Dist. Ct. App. 2004), *review denied*, 879 So. 2d 622 (Fla. 2004) (finding Florida's Internet luring statute was not overbroad to render the statute unconstitutional).

<sup>191</sup> *Hsu*, 99 Cal. Rptr. 2d at 194.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 196–97.

<sup>194</sup> *New York v. Ferber*, 458 U.S. 747, 761–62 (1982) (noting that although advertising and selling of child pornography are an economic motive for the production of child pornography, this material does not deserve the same constitutional protection as other legal economic activities); see also *People v. Foley*, 731 N.E.2d 123, 133 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000).

vations is considered commerce.<sup>195</sup> For example, the court in *People v. Backlund* concluded that “it is difficult to ascertain any legitimate commerce that is derived from the willful transmission of explicit or implicit sexual communications to a person believed to be a minor in order to willfully lure that person into sexual activity.”<sup>196</sup> If courts determined commerce was not affected by Internet luring laws, they need not apply the *Pike* balancing test.

Some courts have taken a view similar to the *Pataki* court, finding that the Internet as a whole acts as part of interstate commerce and therefore cannot escape the Commerce Clause.<sup>197</sup> In *Cashatt v. State*, the Florida District Court of Appeals followed the *Pataki* view and applied the *Pike* balancing test to the Florida Internet luring statute. Ultimately, the court found the statute to be constitutional.<sup>198</sup> The court found the government has a compelling interest to protect minors and the statute does not burden legitimate commerce.<sup>199</sup> In addition, the court stated that the “effect . . . is incidental at best and is far outweighed by the state’s interest in preventing harm to the minors.”<sup>200</sup>

Even if state courts find that Internet luring statutes do not affect commerce, they still must discuss the state autonomy aspect of the dormant Commerce Clause.<sup>201</sup> The Internet has created the opportunity to interact with anyone worldwide from the comfort of one’s living room. Therefore, Internet luring laws may affect state autonomy. States have taken a variety of approaches to address state autonomy.<sup>202</sup> For example, the Illinois Appellate Court ruled that actions taken on the Internet by a defendant bring him or her within the jurisdiction of Illinois.<sup>203</sup> This runs counter to the California Court of Appeals ruling that under California penal statutes, California courts cannot impose its luring statute on individuals who commit an extraterritorial offense. Therefore, Cali-

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<sup>195</sup> See generally *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000), cert. denied, 532 U.S. 1009 (2001) (finding that the Internet luring statute affects those who have the intent to target children, not those who merely speak with minors or post information for all Internet users); *Foley*, 731 N.E.2d at 133; *State v. Backlund*, 672 N.W.2d 431, 438 (N.D. 2003); *People v. Barrows*, 709 N.Y.S.2d 573, 574–75 (N.Y. App. Div. 2000), appeal denied, 738 N.E.2d 784 (N.Y. 2000).

<sup>196</sup> *Backlund*, 672 N.W.2d at 438.

<sup>197</sup> *Am. Libraries Ass’n, Inc. v. Pataki*, 969 F. Supp. 160, 172 (S.D.N.Y. 1997).

<sup>198</sup> *Cashatt v. State*, 873 So. 2d 430, 436 (Fla. Dist. Ct. App. 2004); see also *People v. Hsu*, 99 Cal. Rptr. 2d 184, 192 (Cal. Ct. App. 2000) (finding the California Internet luring statute does not violate the dormant Commerce Clause under the *Pike* balancing test).

<sup>199</sup> *Cashatt*, 873 So. 2d at 436.

<sup>200</sup> *Id.*

<sup>201</sup> *Hatch v. Sup. Court of San Diego*, 94 Cal. Rptr. 2d 453, 472–73 (Cal. Ct. App. 2000).

<sup>202</sup> See, e.g., *People v. Ruppenthal*, 771 N.E.2d 1002, 1007–08 (Ill. App. Ct. 2002), cert. denied, 540 U.S. 813 (2003); *Hatch*, 94 Cal. Rptr. 2d at 472–73.

<sup>203</sup> *Ruppenthal*, 771 N.E.2d at 1007–08; see also *State v. Graham*, No. 04CA0048-M, 2005 WL 356800 (Ohio Ct. App. 2005) (finding the Ohio Internet luring law does not violate the Commerce Clause and that the Internet does not mandate national regulation).

ifornia will not impose its statutes on other states.<sup>204</sup>

Practical difficulties in prosecuting individuals who reside outside the state also exist, such as finding the sexual predator.<sup>205</sup> In most of the cases where the Internet luring statutes have been challenged, jurisdiction is not an issue because the offender has traveled into the state and established territorial jurisdiction.<sup>206</sup> State Internet luring laws may be found constitutional if they regulate conduct and consequently do not violate the First Amendment. Nor do they usually violate the dormant Commerce Clause because the action which is regulated may not be found to burden commerce and most offenders bring themselves into contact with the regulating jurisdiction.

#### V. AMENDING INTERNET LURING LAWS: HOW FAR CAN STATES GO TO REGULATE INTERNET LURING?

In August 2005, the California legislature proposed the Sexual Predator Punishment and Control Act: Jessica's Law.<sup>207</sup> If passed, this legislation would

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<sup>204</sup> *Hatch*, 94 Cal. Rptr. 2d at 472–73 (assuming that state prosecutors will only file charges against defendants that meet the de minimis acts of the statute and therefore there should be no concern that this will affect interstate commerce by causing individuals to refrain from engaging in particular activities); *see also* *People v. Hsu*, 99 Cal. Rptr. 2d 184, 191 (Cal. Ct. App. 2000) (looking at the entire California penal code, the Internet luring statute could only be applied to those activities within California).

<sup>205</sup> *Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 178 (S.D.N.Y. 1997).

[I]n the present case, New York's prosecution of parties from out of state who have allegedly violated the Act, but whose only contact with New York occurs via the Internet, is beset with practical difficulties, . . . . The prospect of New York bounty hunters dragging pedophiles from the other 49 states into New York is not consistent with traditional concepts of comity.

*Id.*

<sup>206</sup> *See Ruppenthal*, 771 N.E.2d at 1007–08.

<sup>207</sup> Sexual Predator Punishment and Control Act: Jessica's Law, S. 588, 2005–2006 Reg. Sess. (Cal. 2005); Assemb. 231, 2005–2006 Reg. Sess. (Cal. 2005). Section 288.3 states:

(a) Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section 207, 209, 261, 264.1, 273a, 286, 288, 288a, 288.2, 289, 311.1, 311.2, 311.4, or 311.11 involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.

(b) as used in this section, "contacts or communicates with" shall include direct and indirect contact or communication that is achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.

(c) A person convicted of a violation of subdivision (a) who previously has been convicted of a violation of subdivision (a) shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.

*Id.*

increase sentencing guidelines for sex offenders, create larger areas where sexual predators may not live, and amend the Internet luring law already in place.<sup>208</sup> The current Internet luring law in California requires a victim to suffer direct harm before the sexual predator can be subjected to criminal penalties.<sup>209</sup> The proposed amendment would criminalize any contact or communication with a minor with the intent of engaging in sexual conduct or abuse.<sup>210</sup> This proposed amendment differs from Internet luring laws in other states because it only requires the sexual predator to contact or communicate with a minor with the intent to commit one of the proscribed sexual offenses, whereas other states require sexual communication *and* an invitation or inducement to engage in sexual acts. Research demonstrates that the Internet creates an opportunity for sexual predators to lure youth away from their homes. Thus places youth at risk for sexual abuse and motivated the California Senate to amend its Internet luring statute<sup>211</sup> to protect California's youngest citizens from sexual predators.<sup>212</sup> The amendment takes great steps in protecting youth from sexual predators but is unlikely to pass constitutional scrutiny.

The Supreme Court decisions regarding the CDA, the COPA, the CPPA, and the CIPA provide some guidance on First Amendment challenges to Internet regulations.<sup>213</sup> Federal courts that have made determinations as to how state governments may regulate the Internet are helpful in evaluating the constitutionality of the California amendment.<sup>214</sup> In light of the decisions previously discussed, the proposed California amendment will pass a First Amendment challenge but will fail a dormant Commerce Clause challenge.

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<sup>208</sup> *Id.*

<sup>209</sup> Press Release, Office of the Governor of California, Current Law vs. the Sexual Predator Punishment and Control Act (Aug. 16, 2005), [http://www.governor.ca.gov/state/govsite/gov\\_htmldisplay.jsp?sFilePath=/govsite/spotlight/a081605\\_law\\_comparison.htm&sCatTitle=&](http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp?sFilePath=/govsite/spotlight/a081605_law_comparison.htm&sCatTitle=&).

<sup>210</sup> Cal. S. 588; Cal. Assemb. 231.

<sup>211</sup> Cal. S. 558 § 2(d):

The universal use of the Internet has also ushered in an era of increased risk to our children by predators using this technology as a tool to lure children away from their home and into dangerous situations. Therefore, to reflect society's disapproval of this type of activity, adequate penalties must be enacted to ensure predators cannot escape prosecution.

*Id.* (findings of the California Senate noting an increased need for protection on the Internet).

<sup>212</sup> Cal. S. 558, § 2 (finding Californians will be better able to protect themselves from sexual predators).

<sup>213</sup> See discussion *supra* Part III.

<sup>214</sup> See discussion *supra* Part IV.

### A. First Amendment Issues Facing Jessica's Law

First Amendment scrutiny will be implicated if a luring statute regulates speech rather than conduct. The federal statutes reviewed by the Supreme Court regulated speech on the Internet.<sup>215</sup> In addition, many of the state Internet luring regulations challenged on First Amendment grounds have been determined to regulate speech.<sup>216</sup> The federal courts that determined state Internet luring statutes did not regulate speech found conduct to be the key element to the crime.<sup>217</sup> The California amendment prohibits contact or communications through a variety of mediums including media, telephones, and computers.<sup>218</sup> Under this amendment, a sexual predator must take affirmative steps to contact or communicate with a minor, thus creating an element of conduct.<sup>219</sup> The conduct element to the California amendment is key to its survival under the First Amendment.

The proposed California legislation differs from the regulation of speech in the CDA, the CPPA, the COPA, and the CIPA.<sup>220</sup> The illegal action in the California amendment is not constituted by merely placing sexual material on the Internet for everyone to see, but instead applies to sexual advances directed at a child.<sup>221</sup> The ideas contained in the communication may be protected speech, but when the ideas are purposely expressed to a child who is constitutionally protected from such speech they may be regulated by criminalizing the conduct.

Assuming the amendment does regulate speech, California must show that it is using the least restrictive means to achieve a compelling government interest.<sup>222</sup> The possible harm done to youth through Internet luring is equivalent to those harms the Court acknowledged in *Ferber*.<sup>223</sup> Therefore, the California amendment passes the compelling interest prong without question.

The least restrictive means prong of the First Amendment test has often been the fatal element for legislation regulating the Internet.<sup>224</sup> Because of the Inter-

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<sup>215</sup> See discussion *supra* Part III.

<sup>216</sup> *People v. Foley*, 731 N.E.2d 123, 129 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000) (determining the luring prong made the statute regulate conduct and not speech).

<sup>217</sup> See generally *State v. Backlund*, 672 N.W.2d 431, 440 (N.D. 2003); *Foley*, 731 N.E.2d at 129; *People v. Ruppenthal*, 771 N.E.2d 1002, 1006 (Ill. App. Ct. 2002), *cert. denied*, 540 U.S. 813 (2003) (finding sexual solicitation discussions illegal only if acted upon).

<sup>218</sup> See source cited *supra* note 207.

<sup>219</sup> Conduct is defined as “[p]ersonal behavior, whether by action or inaction; the manner in which a person behaves.” BLACK’S LAW DICTIONARY 315 (8th ed. 2004).

<sup>220</sup> See discussion *supra* Part III.

<sup>221</sup> Sexual Predator Punishment and Control Act: Jessica’s Law, S.B. 588, 2005–2006 Reg. Sess. (Cal. 2005); Assemb. B. 231, 2005–2006 Reg. Sess. (Cal. 2005).

<sup>222</sup> See *supra* note 87 and accompanying text.

<sup>223</sup> See *supra* note 83 and accompanying text.

<sup>224</sup> See discussion *supra* Parts III, IV.A.1, and IV.B.1.



net's rapid growth, it is very difficult for legislatures to ensure their statutes and amendments meet this test.<sup>225</sup> The Supreme Court observed this problem in *Ashcroft v. American Civil Liberties Union* when the Court remanded the case for the second time, noting that during the lengthy litigation the Internet technology had changed.<sup>226</sup>

The Supreme Court has not expressly stated that using filters would be the least restrictive means to protect youth from harmful material on the Internet, but considering the Court's approval of the CIPA, filters may be a viable option.<sup>227</sup> Although parents may be able to use filters to restrict chat rooms, this does not prevent youth from being targeted in other ways such as through e-mail.<sup>228</sup> Even if parents limit their child's access to appropriate chat rooms, youth may be targeted by other minors or sexual predators who assume an identity which would allow them to go undetected in such a room.<sup>229</sup> Youth often use personal messaging systems such as America Online Instant Messenger or Yahoo! Messenger to work on school projects or chat with friends.<sup>230</sup> Youth who use these programs must be over age thirteen and can set their own controls; therefore parents and filtering software are ineffective.<sup>231</sup> Thus, filters may not have advanced enough to fully protect youth from sexual predators online.

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<sup>225</sup> See *Ashcroft v. ACLU (COPA II)*, 542 U.S. 656, 671–72 (2004).

<sup>226</sup> *Id.*

<sup>227</sup> *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 207–09 (2003); see also *COPA II*, 542 U.S. at 671–72. Finding filters may be an option for parents who wish to protect their children from harmful material on the Internet. *Id.* However, the Court believed that the capabilities of filtering software changed since the original findings of fact and remanded the case so the lower courts could determine if filters would be a viable option. *Id.*

<sup>228</sup> See generally LAZARUS ET AL., *supra* note 15; TEEN SAFETY, *supra* note 32, at 11–12; CHILD SAFETY, *supra* note 32.

<sup>229</sup> See generally TEEN SAFETY *supra* note 32; CHILD SAFETY *supra* note 32.

<sup>230</sup> America Online Instant Messenger (“AIM”) and Yahoo! Messenger are programs which allow individuals to “talk” with one another over the Internet in real time. Yahoo! Messenger, <http://messenger.yahoo.com> (follow “For New Users” hyperlink) (last visited Jan. 23, 2006); What’s AIM?, [http://www.aim.com/help\\_faq/starting\\_out/getstarted.adp](http://www.aim.com/help_faq/starting_out/getstarted.adp) (last visited Jan. 23, 2006). The AIM Privacy Policy states that children under age thirteen are restricted from setting up an account and the software will not allow an individual who indicates by their birth date that they are under age thirteen to create an account. AIM Privacy Policy, [http://www.aim.com/tos/privacy\\_policy.adp?aolp=](http://www.aim.com/tos/privacy_policy.adp?aolp=) (last visited Jan. 23, 2006). Yahoo! Messenger requires a Yahoo! Family Account to be created by a parent when a child under thirteen years old wants to download the software. Yahoo! Privacy Policy, <http://privacy.yahoo.com/privacy/us/mesg> (last visited Jan. 23, 2006). The Family Account allows parents to set controls as to with whom their child may speak. Yahoo! Privacy, <http://privacy.yahoo.com/privacy/us/family/details.html> (last visited Jan. 23, 2006). However, the target of many pedophiles on the Internet are children from fourteen to seventeen years old and these protections established by America Online and Yahoo! do not affect this age group. See CHAPPELL & CZECH, *supra* note 14.

<sup>231</sup> See source cited *supra* note 228.

The California amendment must also be evaluated on the grounds of overbreadth and vagueness in order to pass First Amendment scrutiny. A statute that is too vague can curtail speech which is otherwise constitutionally protected.<sup>232</sup> Individuals need to have a clear idea of what they are able to say and do without fearing prosecution.<sup>233</sup> The California amendment is specific as to the intent necessary by the sexual predator and adequately defines the forms of communication which are regulated by the statute.<sup>234</sup> As long as the crimes indicated in the amendment are not vague, individuals have notice as to what speech and manner of communications are regulated by the amendment. There is no fear that the amendment may prevent individuals from expressing constitutionally protected speech.

#### B. Dormant Commerce Clause Issues Facing Jessica's Law

The Internet has undeniably become a key aspect of commerce.<sup>235</sup> If the dormant Commerce Clause applies to the California amendment, a determination must be made as to whether the Internet luring statute affects commerce. This is dependent on whether the amendment is viewed as one regulating the Internet or one regulating the conduct of an individual.<sup>236</sup> Some federal courts have determined that any Internet regulation will affect commerce.<sup>237</sup> Under this view the *Pike* balancing test would apply to determine whether the proposed amendment would survive a dormant Commerce Clause challenge.<sup>238</sup>

In the situations regulated by the proposed amendment, however, a commercial transaction is not occurring; instead there is conduct—an action of communication being passed from an individual to a minor.<sup>239</sup> Unless the court takes the stance that any regulation of the Internet affects commerce, the Internet luring laws should not be considered to affect interstate commerce, therefore the dormant Commerce Clause is not invoked.<sup>240</sup>

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<sup>232</sup> *Cashatt v. State*, 873 So. 2d 430, 435 (Fla. Dist. Ct. App. 2004) (“[A] statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and is written in a manner that encourages or permits arbitrary or discriminatory enforcement.”).

<sup>233</sup> *Reno v. ACLU (CDA III)*, 521 U.S. 844, 871–72 (1997).

<sup>234</sup> See *supra* note 207 and accompanying text.

<sup>235</sup> See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, E-COMMERCE 2003 HIGHLIGHTS 2–3 (2005), <http://www.census.gov/eos/www/papers/2003/2003finaltext.pdf>. In 2003, the value of commerce taking place over the Internet was more than \$730 billion. *Id.* However, the majority of commerce over the Internet took place between businesses and not between businesses and consumers. *Id.*

<sup>236</sup> See discussion *supra* Part IV.B.2.

<sup>237</sup> *Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

<sup>238</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>239</sup> See cases cited *supra* note 217.

<sup>240</sup> Cf. *Pataki*, 969 F. Supp. at 172.

### 1. Pike Balancing Test

Nevertheless, should the courts determine that an Internet luring law does affect interstate commerce, the statute must then survive the *Pike* balancing test.<sup>241</sup> There is no doubt that California has a compelling local purpose in protecting minors from sexual predators on the Internet as determined in *Ferber*. Therefore, the first prong of the test is met.<sup>242</sup>

The second part of the *Pike* balancing test requires courts to look at the extent of the burden placed on interstate commerce.<sup>243</sup> In *American Booksellers Foundation v. Dean*, the court applied a three-part test to determine whether interstate commerce was burdened.<sup>244</sup> Applying the same test to the California amendment, we find that it does not burden interstate commerce.

First, the court must determine whether the statute shifts the cost of regulation onto other states.<sup>245</sup> The intent of the California legislature places the burden of regulation on California law enforcement. The burden this amendment creates will be placed on the law enforcement officers of California who must investigate violations of the amendment and actively seek out sexual predators on the Internet that contact minors with the intent to commit a sexual crime.<sup>246</sup> Other states will not be responsible for enforcing the amendment and therefore it does not burden interstate commerce under this prong.

The California amendment does not target any form of commercial good therefore, the only possible aspect of commerce that could be affected is Internet consumption.<sup>247</sup> The California amendment would not create a situation in which out-of-state Internet consumption would change, which is required as the second aspect to determine the burden on interstate commerce.<sup>248</sup> Pedophiles only comprise a small portion of all Internet users.<sup>249</sup> Because the

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<sup>241</sup> *Pike*, 397 U.S. at 142.

<sup>242</sup> *New York v. Ferber*, 458 U.S. 747, 757–58 (1982).

<sup>243</sup> *Pike*, 397 U.S. at 142.

<sup>244</sup> *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003).

<sup>245</sup> *Id.*

<sup>246</sup> See generally Kimberly J. Mitchell et al., *Police Posing as Juveniles Online to Catch Sex Offenders: Is It Working?*, 17 *SEXUAL ABUSE: A J. OF RESEARCH & TREATMENT* 241 (2005) (looking at the data collected by the National Juvenile Online Victimization Study on Internet sex crimes and determining how effective police officers are in protecting minors from sexual predators). Courts generally have approved the practice of police officers posing as minors on the Internet in order to find sexual predators. See *State v. Cunningham*, 808 N.E.2d 488 (Ohio Ct. App. 2004), *appeal not allowed*, 821 N.E.2d 578 (Ohio 2005) (finding a police officer posing as a minor to investigate sexual predators is not outrageous governmental conduct); *State v. Snyder*, 801 N.E.2d 876, 888–89 (Ohio Ct. App. 2003), *appeal not allowed*, 807 N.E.2d 367 (Ohio 2004).

<sup>247</sup> *Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 172 (S.D.N.Y. 1997).

<sup>248</sup> *Am. Booksellers Found.*, 342 F.3d at 102.

<sup>249</sup> No studies demonstrate the number of pedophiles on the Internet. Compare OFFENDER TYPOLOGY, *supra* note 31 (illustrating a profile of pedophiles who use the Internet

amendment would only affect the use of pedophiles, total Internet consumption should not change.

Finally, in determining the burden on interstate commerce, the court must consider the effect on the interstate flow of goods.<sup>250</sup> The California amendment regulates communication and conduct, such as contacts with the intent to commit any number of sexual offenses and will not affect the interstate flow of goods on the Internet.<sup>251</sup> The regulated actions in the proposed Internet luring law cover only a small fraction of the many things an individual can do on the Internet. It would follow from this that Internet consumption would not be affected by the amended California Internet luring law. Only Internet consumption by sexual predators who utilize the Internet solely for the purpose of contacting and communicating with a minor with the intent to commit one of a number of specified sex crimes would be eliminated. We live in a time when the Internet offers access to many different opportunities and its use is becoming common place in many aspects of everyday life. It is hard to believe the sexual predators affected by Jessica's Law do not use the Internet for purposes that fall outside the scope of this regulation.<sup>252</sup> The amendment does not satisfy any of the factors to which courts look to determine a burden on interstate commerce and, therefore, will not to invoke this aspect of the dormant Commerce Clause.

## 2. State Autonomy

The California amendment will have a difficult time surviving an autonomy challenge because a sexual predator may not know he is chatting with a child in California. As compared to other Internet luring statutes, California prosecutors need not show that the sexual predator and minor made plans to meet. Instead, the statute requires that the sexual predator only needs to "contact or communicate" with a minor.<sup>253</sup> Sexual predators who are convicted of Internet

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to satisfy their addiction) *with* COMPUTER USE IN THE UNITED STATES: 2003, *supra* note 13 (showing the total number of Americans who used the Internet in 2003).

<sup>250</sup> *Am. Booksellers Found.*, 342 F.3d at 102.

<sup>251</sup> The California amendment may affect the interstate flow of Internet child pornography which would be a positive effect of the amendment because both federal and state law prohibit child pornography. *See* *New York v. Ferber*, 458 U.S. 747, 765 (1982) (finding child pornography is not entitled to First Amendment protection).

<sup>252</sup> NAT'L TELECOMMS. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE (2004), <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.htm> (finding 66% of Internet users who have broadband connections and 51% of Internet users with dial-up service use the Internet on a daily basis). Individuals with broadband Internet connections participate in a number of online activities, including researching information and purchasing products or services. *Id.*

<sup>253</sup> *Compare* Sexual Predator Punishment and Control Act: Jessica's Law, S.B. 588,

luring are commonly arrested when they arrive at the planned meeting location.<sup>254</sup> In planning a meeting, the minor and sexual offender must discuss their locations and, because minors are unable to travel long distances without triggering suspicion from their parents, the offender usually travels to the minor's state.<sup>255</sup> Offenders under the California amendment would not be required take the same steps to be convicted of Internet luring and, therefore, would not have the same notice that they are subjecting themselves to California laws.<sup>256</sup> This is the fatal aspect of the California amendment and any state-created statute regulating the Internet.

The California amendment will have a very difficult time passing constitutional muster. In the end, it will likely survive First Amendment scrutiny but will fail under the state autonomy aspect of the dormant Commerce Clause. Given the intent requirement, the proposed amendment regulates conduct and not speech. Consequently the First Amendment does not bar California from enacting such legislation.<sup>257</sup> The dormant Commerce Clause presents a bigger challenge not because the amendment proposed by California may substantially affect or burden interstate commerce, but because the nature of the Internet demands regulation on a national level.<sup>258</sup>

The requirement of national, if not international, regulation ensures a state's inability<sup>259</sup> to regulate the Internet without affecting other states' autonomy.<sup>260</sup> Congress must follow the California amendment's approach of protecting youth from the point a sexual predator initiates contact in attempting to create similar legislation. National legislation modeled after the California

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2005–2006 Reg. Sess. (Cal. 2005) (the California Senate's version of Jessica's Law), and Assemb. B. 231, 2005–2006 Reg. Sess. (Cal. 2005) (the California Assembly's version of Jessica's Law), with statutes cited *supra* note 25 (compiling a sampling of current state Internet luring statutes).

<sup>254</sup> See Mitchell et al., *supra* note 246; see also TECHNOPHILIA, *supra* note 52 (explaining the actions a sexual predator takes in luring a child).

<sup>255</sup> In traveling into another state, the offender would have notice that he is subjected to the laws of that state and, therefore, the Internet luring laws of one state would not affect the autonomy of other states. See *Burnham v. Sup. Court of Cal.*, 495 U.S. 604 (1990).

<sup>256</sup> S.B. 588; Assemb. B. 231. By only requiring "contact or communication," the sexual predator does not need to travel or make plans to travel to another location in order to violate the California amendment. Therefore, there is no initial need for these predators to know in which state their victim is located and, therefore, which state laws they are subjecting themselves to. *Id.*

<sup>257</sup> See discussion *supra* Part V.A.

<sup>258</sup> See generally discussion *supra* Part V.B.

<sup>259</sup> See Editorial, *e-Meddling*, WALL ST. J., Oct. 17, 2005, at A18 (discussing the United Nations Working Group on Internet Governance's work on possible international Internet regulation); see also Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215 (2000); Shipchandler, *supra* note 111.

<sup>260</sup> *Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 171 (S.D.N.Y. 1997).

amendment, paired with Internet law enforcement units, would make a sexual predator think twice before contacting someone he or she believes is a minor. Congress would not experience the same downfall that arose with the CDA, the CPPA, and the COPA because the conduct element protects Internet luring laws from First Amendment challenges.

In the physical world, many things are inappropriate for minors, and parental supervision and industry standards do provide minors with some protection.<sup>261</sup> The Internet is beginning to offer similar protection by giving parents control over what their children are able to access and creating places on the Internet which are child-friendly.<sup>262</sup> In the interest of providing further protection, the demand for an aggressive Internet luring statute outweighs the need for statutes like the CDA and the COPA.<sup>263</sup> Congress would have more success regulating conduct and not content on the Internet.

## VI. CONCLUSION

Growing up, children are taught not to talk to or accept gifts from strangers. This advice works well in the physical world. However, in the virtual world of the Internet, parents must find new ways to teach their children how to protect themselves. Congress has enacted three statutes—the CDA, the CPPA, and the COPA—in an attempt to protect minors from harmful material on the Internet.<sup>264</sup> Unfortunately, the Supreme Court has found that all three statutes violated the First Amendment.<sup>265</sup> State legislatures have enacted similar content-

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<sup>261</sup> See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (finding the New York legislature can restrict the sale of sexually explicit magazines to minors). Industry standards and local regulations often require magazines to be stored out of a minor's sight. See, e.g., DOVER, N.H., CODE, § 56-3 (1997). Wal-Mart Stores, Inc. has extended this by displaying magazines behind U-shaped covers which block the right and left sides of specific magazine covers so that the contents of the magazine are not visible. See Wal-Mart Facts, Key Topics, Merchandising, <http://www.walmartfacts.com/keytopics/merchandising.aspx> (last visited Jan. 27, 2006). Additionally, television shows which are inappropriate for children are shown on channels which require age verification, and are aired at times when children are more likely to be asleep. 47 U.S.C. § 561 (2000).

<sup>262</sup> See *supra* note 16 and accompanying text. See *generally supra* note 139 and accompanying text.

<sup>263</sup> See *generally* FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY, *supra* note 19.

<sup>264</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 223 (2000)); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 2251 (2000)); Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (2000)).

<sup>265</sup> *Reno v. ACLU (CDA III)*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Ashcroft v. ACLU (COPA I)*, 535 U.S. 564 (2002); *Ashcroft v. ACLU (COPA II)*, 542 U.S. 656 (2004).

based statutes that have also failed First Amendment scrutiny.<sup>266</sup> The fluid nature of the Internet is fatal to these statutes because, as Internet technology advances, so does the ability to regulate content in a less restrictive manner than the statutory language provides.<sup>267</sup>

In an effort to protect youth on the Internet, the trend among state legislatures is to enact Internet luring laws that criminalize the solicitation of sex from a minor over the Internet.<sup>268</sup> State Internet luring laws have successfully survived First Amendment challenges because they regulate conduct and not speech. They face a bigger challenge, however, with the dormant Commerce Clause.<sup>269</sup> Federal courts are divided as to whether Internet luring laws substantially affect interstate commerce and invoke the dormant Commerce Clause.<sup>270</sup> One view is that the Internet is a key aspect of commerce and therefore any state Internet regulation violates the dormant Commerce Clause.<sup>271</sup> Other courts find Internet luring statutes regulate conduct which cannot be considered commerce, and therefore such legislation does not affect interstate commerce.<sup>272</sup> In addition to this challenge, the state autonomy aspect of the dormant Commerce Clause is often fatal to state Internet regulations due to the global nature of the Internet.<sup>273</sup> Internet luring statutes survive this aspect of the dormant Commerce Clause by only prosecuting those individuals who enter the jurisdiction.<sup>274</sup>

California recently proposed an amendment to its Internet luring law which would criminalize the first contact or communication between a sexual predator and a minor when the offender has the intent to commit a sexual offense.<sup>275</sup> This amendment regulates conduct and would therefore survive a First Amendment challenge. Yet, it would fail a dormant Commerce Clause challenge as a violation of state autonomy.<sup>276</sup> The California amendment will not give sexual predators the choice to subject themselves to the laws of California since the first contact or communication between a sexual predator and minor

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<sup>266</sup> *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *PSINET Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004); *Cyberspace, Comm'n, Inc.*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000).

<sup>267</sup> *COPA II*, 542 U.S. at 671.

<sup>268</sup> See statutes cited *supra* note 25; see also statutes cited *supra* note 180.

<sup>269</sup> See *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190 (Cal. Ct. App. 2000); *People v. Foley*, 731 N.E.2d 123, 132 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000).

<sup>270</sup> See *Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 172 (S.D.N.Y. 1997). *But see State v. Backlund*, 672 N.W.2d 431, 438 (N.D. 2003).

<sup>271</sup> *Pataki*, 969 F. Supp. at 172.

<sup>272</sup> *Backlund*, 672 N.W.2d at 438.

<sup>273</sup> *Cashatt v. State*, 873 So. 2d 430, 436 (Fla. Dist. Ct. App. 2004).

<sup>274</sup> *Hatch v. Sup. Court of San Diego*, 94 Cal. Rptr. 2d 453, 472–73 (Cal. Ct. App. 2000).

<sup>275</sup> *Sexual Predator Punishment and Control Act: Jessica's Law*, S.B. 588, 2005–06 Reg. Sess. (Cal. 2005); *Assemb. B. 231*, 2005–06 Reg. Sess. (Cal. 2005).

<sup>276</sup> See discussion *supra* Part V.B.2.

would be a violation and the offender may not know he or she is subjecting himself or herself to California law.<sup>277</sup>

The California amendment is a great way to protect minors from sexual predators on the Internet and should be used by Congress as a guide to amend the federal Internet luring statute. The Internet is included in the class of things which need to be regulated by one federal statute and not many different state statutes.<sup>278</sup> Using previous Supreme Court and federal court holdings as guidelines, Congress should adapt the California amendment into the federal Internet luring laws and create a law which would fully protect our youngest citizens from pedophiles on the Internet.

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<sup>277</sup> See discussion *supra* Part V.B.2.

<sup>278</sup> *Am. Libraries Ass'n, Inc. v. Pataki*, 969 F. Supp. 160, 172 (S.D.N.Y. 1997).